



# Understanding and Efficiently Managing Right-to-Take Challenges in Kentucky

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in cooperation with  
Kentucky Transportation Cabinet  
Commonwealth of Kentucky

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**Research Report**  
KTC-21-11/KHIT136-1F

**Understanding and Efficiently Managing Right-to-Take Challenges in Kentucky**

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## Executive Summary

Kentucky constitutional and statutory law requires that a fair process be in place to let a property owner challenge a condemnor's right to acquire private property, including a right to appeal the initial decision. Property acquired by a condemnor must be for public use, and property owners have the right to an immediate and expedited hearing on right-to-take. Two of these requirements will remain in place regardless of statutory revisions: the requirement that property must be needed (i.e., not arbitrary) for public use, and the right to one appeal. Only an amendment(s) to the Kentucky Constitution would alter these requirements. The right to an expedited hearing is granted by statute and subject to statutory revisions. Most condemnation practitioners perceive the frequency of right-to-take challenges as holding steady, while others see them as increasing.

Attorneys report that most property owners make right-to-take challenges because they perceive the condemnor's offer of just compensation as unfair. Attorneys also observe that property owners sometimes leverage challenges as a delay tactic or to minimize a project's impact on their property. Kentucky has what the legal community considers a *quick take* approach to eminent domain, which means that the right to access and use property is obtained before a final determination is made on compensation. While a property owner is free to make right-to-take challenge or appeal an unsatisfactory decision of a challenge, Kentucky's Eminent Domain Act and legal precedents require expedited trials and appeals of this issue. Additionally, condemnation practitioners currently have tools at their disposal to help prevent a challenge or overcome delays in resolving a challenge.

A range of solutions are available to improve the right-to-take process. For example, before identifying a parcel as requiring condemnation, preventative measures can be taken during right-of-way negotiations and must be implemented with Division of Right of Way agents working more closely with attorneys prior to. Other solutions can be adopted through more efficient record keeping during a roadway project's planning and acquisition phases. Attorneys litigating these cases can leverage a number of legal tools, including the use of an Agreed Interlocutory Order and Judgment; dismissing suits and refiling them after a perceived deficiency has been corrected; a more informed understanding of stays with a selective use of supersedeas bonds, and Civil Rule 11 sanctions (imposition of attorney fees). Early right of entry agreements are also available. One strategy not fully available in Kentucky is a statutory requirement holding that the losing party pay attorney fees if a challenge is made. A condemnor can request — and has been awarded — attorney's fees after a successful defense of a right-to-take challenge. However, the award is discretionary and will only be granted in the face of egregious conduct.

Compared to other states, Kentucky employs similar resolution methods (e.g., monetary settlements, plan changes). And its performance in resolving right-to-take challenges equals that of other states.

## Chapter 1 Legal History of Challenging the Right-to-Take in Kentucky

Right-to-take challenges delay a condemnor's project delivery schedule. Issuing efficient and effective responses to these challenges is critical for successful project completion. This report extrapolates information from Kentucky case law to assess trends in decisions and strategies for preventing and litigating these challenges. A condemnor's right-of-way staff can use the ideas presented here to better understand right-to-take challenges and legal staff can use the information as a resource. The remainder of this chapter introduces key definitions and issues related to right-to-take challenges. Table 1.1 summarizes the report's structure.

**Table 1.1** Report Contents

<b>Chapter 2</b>	• Review of 2020 national-level attorney surveys on right to take
<b>Chapter 3</b>	• Practices used to negotiate right-to-take challenges and issues which hinder resolution
<b>Chapter 4</b>	• Detailed assessment of how Kentucky courts have ruled on right-to-take cases
<b>Chapter 5</b>	• Presents eight strategies condemnation practitioners can implement to expedite handing of right-to-take challenges
<b>Chapter 6</b>	• Review of right-to-take processes and statutes in other states
<b>Chapter 7</b>	• Conclusions

Analysis presented in this report draws from our review of Kentucky appellate decisions covering right-to-take challenges within condemnation cases. Procedurally, a case was first decided by a trial court and later appealed. We do not address cases that were not appealed or are currently being litigated. The review includes decisions from the Kentucky Court of Appeals and Kentucky Supreme Court, with Supreme Court decisions being the final word on an issue. For those unfamiliar with legal citations, Court of Appeals decisions have "Ky. App." immediately preceding the decision's date, e.g. (Ky. App. 2021). For Supreme Court decision, the citation is designated by "Ky." immediately preceding the date of the decision, (e.g., (Ky. 2021)). If looking at the decision and not the citation, confusion may arise over which court is making the decision due to the history of the Kentucky Court system. Historically, the system included a county court in each Kentucky county which served as the trial court. Under this old system, the first-level appellate court was the Circuit Court which heard trial court appeals from more than one county. The second and final level of appellate court was the Court of Appeals. In 1972 Kentucky courts were reorganized. County courts were abolished, and circuit courts became trial courts. The first level of appeal was to the Court of Appeals and the second and final level of appeal was to the newly created Kentucky Supreme Court. It is possible for a pre-1972 decision to state at the beginning of the opinion that it is an opinion from the Court of Appeals. However, the citation will indicate it is from the highest Kentucky appellate court (e.g. (Ky. 1971)). If so, the opinion is from Kentucky's then-highest court and should be treated as the authority on the issue just as Kentucky Supreme Court decisions are after 1972.

Although the majority of cases referenced are related to Kentucky's transportation agency, the review includes any decision where the power of eminent domain is invoked to acquire personal or real property. These opinions relate to the how the power of eminent domain is regulated and resolved and is not limited to the entity that has the constitutional or statutory power to wield it.

### 1.1 The Kentucky and United States Constitutions

In 1792 Kentucky ratified its first Constitution. Section 1 of the Bill of Rights states that "All men have certain inherent and inalienable rights." This section lists seven basic rights, with the fifth being "the right of acquiring and protecting property." Section 2 of the Bill of Rights is also noteworthy. It guarantees the right to be free from "Absolute and arbitrary power over our lives, liberty and property." No one can abrogate a Kentuckian's right to this freedom — not even a majority of its citizens.<sup>1</sup>

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<sup>1</sup> See Kentucky Constitution 1792, Bill of Rights, Section 1, Fifth subsection, and Section 2.

At three subsequent constitutional conventions<sup>2</sup> Kentucky's Constitution was amended but language mandating due process provisions for any entity invested with the authority of taking private property for public use — eminent domain — remained steadfast. However, the power of eminent domain can only be exercised for a legitimate public use. It cannot be used by edict (absolutism), and a fair system of oversight must be in place when this power is used.<sup>3</sup>

Later amendments to Kentucky's Constitution clarify the limitation of eminent domain — no person shall, "... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."<sup>4</sup> The most recent amendment dealing with a person's relationship to property affirmed this principal and defined what process is due: "... nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him."<sup>5</sup>

Likewise, the US Constitution mandates that no state can "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."<sup>6</sup> The state may not seize property from an owner without providing due process and just compensation. Nor can property be acquired through actions that are arbitrary or treat owners unequally. Due process lets property owners challenge the use of eminent domain on the grounds of fraud, bad faith, or abuse of discretion.<sup>7</sup> These protections cannot be statutorily excluded from the remedies available to a property owner.

## 1.2 Statutory Mandate and Case Law Interpretation of the Constitutional Process Due

It is helpful to understand the distinction between eminent domain and condemnation. Eminent domain is the *power* of an entity to take private property for public use. Condemnation is the *process* by which the entity exercises that power.<sup>8</sup> For example, KRS §177.021 and KRS §177.081 describe the Kentucky Transportation Cabinet's (KYTC) power to acquire property, while KRS §416.540-670 specify steps for employing that power. Kentucky's Rules of Civil Procedure (CR) as set by the Judicial Branch dictate timelines and judicial actions for the condemnation process.<sup>9</sup>

### 1.2.1 When and How a Right-to-take Challenge Can be Made

In Kentucky, a property owner must file a right-to-take challenge within 20 calendar days of being served with the summons and petition. After the time of filing the petition, the challenge must be done by way of an answer to the petition.<sup>10</sup> The answer is strictly limited to the question of the right of the petitioner to condemn the property.

Any answer or other pleading filed by the owner in response to the summons shall be filed on or before the twenty (20) days after date of service and **shall be confined solely** to the question of the right of the petitioner to condemn the property sought to be condemned, but without

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<sup>2</sup> Constitutional Conventions of 1799, 1850, and 1891. Attempts for constitutional conventions failed in 1931, 1947, 1960, and 1977. The revised 1891 constitution opened a path for constitutional amendments through the state legislature, which has been used successfully.

<sup>3</sup> As will be discussed, Kentucky's highest court has determined that an agency exercising its power of eminent domain can neither act in excess of the power it holds nor act arbitrarily. Kentucky case law and statutory revisions clarified the criteria. To defeat a right-to-take challenge, evidence must show either fraud, bad faith, or abuse of discretion. See e.g., *Com., D.O.H. v. Vandertoll*, 388 S.W. 2d 358 (Ky. 1964) and KRS §177.081.

<sup>4</sup> Kentucky Constitution, 1891, Amendment 5.

<sup>5</sup> Ky. Const. § 13

<sup>6</sup> United States Constitution, 14<sup>th</sup> Amendment, Section 1.

<sup>7</sup> *Commonwealth Dep't of Highways v. Vandertoll*, 388 S.W. 2d 358 (Ky. 1964).

<sup>8</sup> KRS §416.540.

<sup>9</sup> KRS §416.650.

<sup>10</sup> Many steps that must be taken by the attorney prior to getting to service of process, which impacts the timeline for achieving a right of entry. Those steps and how they impact time will be discussed below. There is a case, *Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.* 478 S.W.3d 386 (Ky. App. 2016) Review denied February 10, 2016, which allows for a right-to-take challenge to be filed against a condemnor during pre-litigation negotiations.



prejudice to the owner's right to except from the amount of the compensation awarded in the manner provided in KRS 416.550 to 416.670.<sup>11</sup>

Immediately following a revision of Kentucky's Eminent Domain Act in 1976, a court decision found this requirement should be strictly held to:

The condemnee's answer is "*confined solely to the question of the right of the petitioner to condemn the property...*" KRS 416.600 (emphasis added). The statute directs the condemnee to raise immediately (if at all) the issues of the right-to-take. If no such answer is filed, the trial court must enter an interlocutory judgment which authorizes the taking and grants the right of immediate possession upon payment of the commissioners' award. KRS 416.610(2). Any exceptions to such interlocutory judgment are to be confined to the amount of the award. KRS 416.620(1).<sup>12</sup>

At least one court decision held that a disagreement over a property description is resolved during a case's compensation phase. It is not a right-to-take issue:

Any dispute as to the value of what is actually being taken will be considered at the trial on damages. [citation omitted] The interlocutory order and judgment of the trial court simply found that the DOT had the right to condemn the property described in the complaint.<sup>13</sup>

This includes inaccuracies in the amount of property being acquired.<sup>14</sup>

Arguments regarding access and the resolution of legal arguments are dealt with in the compensation portion of a case. As decided in *Hamilton v. Commonwealth Transp. Cabinet, Dep't of Highways*, 799 S.W.2d 39 (Ky. 1990), neither issue can provide a basis for a right-to-take challenge.

The trial court assured the appellants that they would be entitled to make any and all legal arguments they wanted on the issue of access in the damages portion of the proceeding and that they might "ultimately" succeed in convincing it that CSX's "obligation is greater than it appears." However, the trial court determined that there was nothing unreasonable, unfair or oppressive in CSX's "approach" to the issue so as to implicate CSX's right to file this action. Clearly, CSX was not required to accept the appellants' legal arguments of the extent of its liability in order to be allowed to proceed to condemn. See e.g., *Coke v. Commonwealth, Dept. Of Finance*, Ky., 502 S.W.2d 57 (1973).<sup>15</sup>

A Court of Appeals decision later affirmed by the Kentucky Supreme Court held that a right-to-take challenge can be made during pre-condemnation negotiations.<sup>16</sup> This was attempted in *Collins v. Commonwealth*, 324 S.W.2d 406 (Ky. 1959). The *Collins* right-to-take challenge took the form of a separate action seeking an injunction against a highway project that would convert US 60 to a four-lane highway between Versailles and Frankfort; it was not done within a condemnation case. The action was brought before a condemnation proceeding was initiated on behalf of all property owners affected by the project. It failed because an aggrieved party can only obtain an injunction (which is equitable in nature) if there is no adequate remedy at law and the statute allows for a right-to-take challenge by other judicial means.

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<sup>11</sup> KRS §416.600 *emphasis* and **bold** added.

<sup>12</sup> *Ratliff v. Fiscal Court of Caldwell Cty.*, 617 S.W.2d 36, 38 (Ky. 1981).

<sup>13</sup> *Hart County Bank & Trust Co. v. Transp. Cabinet, Dep't of Highways*, Unpub. LEXIS 1014, \*4 (Ky. App. 2009).

<sup>14</sup> *Hamilton v. Commonwealth Transp. Cabinet, Dep't of Highways*, 799 S.W.2d 39 (Ky. 1990).

<sup>15</sup> *Eaton Asphalt Paving Co. v. CSX Transp.*, 8 S.W.3d 878, 883-84 (Ky. App. 1999).

<sup>16</sup> *Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.* 478 S.W.3d 386 (Ky. App. 2016) Review denied February 10, 2016.

In 2016, review was denied in *Bluegrass Pipeline Company, LLC v. Kentuckians United to Restrain Eminent Domain, Inc.* 478 S.W.3d 386 (Ky. App. 2016), which let members of a nonprofit Kentucky Corporation file pre-condemnation challenges to the condemnor's right-to-take:

In the case at hand, Bluegrass is actively negotiating with landowners. The threat of acquiring land through eminent domain has a current and material impact on negotiations between Bluegrass and landowners. As KURED and the trial court point out, landowners may grant voluntary easements over their property because they do not have the means to engage in litigation to determine the issue. If the eminent domain issue remains unresolved, it would give Bluegrass an unfair advantage during the negotiation process. We find no error on the issue of justiciability.<sup>17</sup>

To date, Kentucky courts have not issued additional opinions on whether property owners can file pre-condemnation right-to-take challenges.

To review, in Kentucky a property owner can submit a right-to-take challenge no later than 20 days after being served with the summons. At that time, the challenge must be stated in the answer to the petition. At least one case allows for a right-to-take challenge to be made before a condemnation action is filed during the statutorily required negotiations. To narrow the issues included in the challenge, attorneys may move to strike an answer based on compensation issues disguised as a right-to-take issue. Attorneys can also move to strike a portion of an answer when a legally permissible right-to-take challenge is made along with impermissible issues of compensation.

### **1.2.2 Right-to-Take Decisions Must Be Expedited**

Delays in obtaining right of entry when a right-to-take challenge has been made occur despite both state statute and Kentucky case decisions requiring the court to hold an expedited hearing on a right-to-take issue once it is properly raised by the property owner. KRS §416.610 states:

If the owner has filed answer or pleading putting in issue the right of the petitioner to condemn the property or use and occupation thereof sought to be condemned, the court shall, without intervention of jury, proceed *forthwith to hear and determine* whether or not the petitioner has such right. If the court determines that petitioner has such rights, an interlocutory judgment, as provided for in subsection (2) of this section, shall be entered.<sup>18</sup>

The decision in *Ratliff v. Fiscal Court of Caldwell Cty.*, 617 S.W.2d 36, 38 (Ky. 1981), lays out in simple terms the process under the statutory scheme adopted in 1976:

If, however, the answer referred to in KRS 416.600 has been filed (putting in issue the right-to-take), *the trial court must immediately determine the matter.*<sup>19</sup>

If the court finds the condemnor is authorized to condemn and has not acted arbitrarily, it enters an interlocutory order and judgment (IOJ). If there is no appeal from the IOJ, the case proceeds to a determination of compensation. The court will dismiss the case if it finds (a) the condemnor lacks the power of eminent domain or (b) exercised that power arbitrarily or in bad faith. The condemnor may then (a) correct the problem and refile the case at a later time<sup>20</sup> and (b) appeal the dismissal.<sup>21</sup> Both actions can be done simultaneously.<sup>22</sup>

In *Ky. Utils. Co. v. Brashear*, 726 S.W.2d 321, (Ky. App. 1987), the trial court understood the need to provide a speedy response to the right-to-take challenge. In this case, the property owners, the Brashears, filed an answer denying

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<sup>17</sup> Id at 390.

<sup>18</sup> KRS §416.610

<sup>19</sup> *Ratliff*, supra. at p. 38. *Emphasis added.*

<sup>20</sup> *Golden Foods, Inc. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 240 S.W.3d 679 (Ky. App. 2007).

<sup>21</sup> *Ratliff v. Fiscal Court of Caldwell Cty.*, 617 S.W.2d 36 (Ky. 1981).

<sup>22</sup> *Golden Foods, Inc., supra.*

the utility company's right to condemn and requesting a hearing. "The [h]earing was held on May 28, 1981. *On that same day the court's findings of fact, conclusions of law and interlocutory judgment granted Kentucky Utilities easement rights and authorized immediate possession.* KRS §416.610(4)." <sup>23</sup> It is unusual for a court to issue a decision which includes findings of fact and conclusions of law on the same day as a hearing. In this case, the property owners argued they did not receive notice the court had done so, and for that reason should be given an extension of time in which to file exceptions. The Court of Appeals, in ruling that no time extension should be granted, was consistent with the trial court's understanding that a right-to-take challenge is a matter to be expedited:

In the case at bar, the findings of fact, conclusions of law, and interlocutory judgment were entered the same day as the hearing from which it resulted. ... Also, Kentucky Utilities was granted authorization to take immediate possession of the easement. The clerk made notation on the judgment that copies were mailed or delivered to the parties' attorneys. It is unclear from the record whether the parties' attorneys were present when the judge made his determinations of fact and law and entered the judgment. Even assuming *arguendo* that the landowners' attorneys were not present at the judgment nor notified of its entry, they should have made inquiry of the progress of the proceedings *as KRS 416.610(4) requires the court to "proceed forthwith" to hear and determine whether or not the petitioner (Kentucky Utilities) has a right to condemn.* <sup>24</sup>

*Hart Cty. Bank & Tr. Co. v. Transp. Cabinet, Dep't of Highways*, No. 2007-CA-002533-MR, Unpub. LEXIS 1014, (Ky. App. 2009), dealt with acceptable timelines for sufficient due process with respect to right-to-take challenges. The property owner argued they had insufficient time to prepare for the right-to-take hearing. The case was filed on August 16, 2007, the Summons was issued on October 9, the Answer filed on October 22, and the right-to-take trial held on November 20, 2007. Three months after the petition was filed and less than a month after the right-to-take challenge was made, the court conducted a hearing. The appellate court concluded: "The only issue before the trial court was the DOT's right to condemn the land described in the complaint. We cannot conclude that the trial court abused its discretion by failing to grant the Bank a continuance." <sup>25</sup> While this decision is unpublished, it still helps set the bar for how swiftly right-to-take hearings should be conducted and concluded.

In another unpublished decision, ten cases raised very similar issues, so they were consolidated (treated as one case) by the trial court and the Court of Appeals. Courts often do this for expediency or, the reason is often referred to as being in "the interest of judicial economy." *Barone v. Sanitation Dist. No. 1* <sup>26</sup>, was decided in May of 2020 after the condemnor provided voluminous discovery. One continuance was granted to the property owners, but even with a continuance, only seven months elapsed between the filing of the condemnation petitions and the right-to-take hearing. The Court of Appeals noted this timeline was consistent with the economical litigation docket to which the case had been assigned. <sup>27</sup> Citing *Ratliff*, the court held there was no reversible error in denying additional continuances to the property owners as "...trial courts are required to immediately decide eminent domain proceedings. *Ratliff*, 617 S.W.2d at 38." <sup>28</sup>

Even though Kentucky statutory and case law require expedited hearings when a right-to-take challenge is made, delays still exist.

<sup>23</sup> *Brashear, infra.*, at 322. Emphasis added.

<sup>24</sup> *Ky. Utils. Co. v. Brashear*, 726 S.W.2d 321, 324 (Ky. App. 1987) *emphasis added*

<sup>25</sup> *Hart County Bank & Trust Co. v. Transp. Cabinet, Dep't of Highways*, Unpub. LEXIS 1014, (Ky. App. 2009).

<sup>26</sup> *Barone v. Sanitation Dist. No. 1*, Nos. 2016-CA-001711-MR, 2016-CA-001712-MR, 2016-CA-001713-MR, 2016-CA-001714-MR, 2016-CA-001715-MR, 2016-CA-001716-MR, 2016-CA-001717-MR, 2016-CA-001718-MR, 2016-CA-001733-MR, 2016-CA-001734-MR, Unpub. LEXIS 32, (Ky. App. 2020).

<sup>27</sup> See Ky. CR Rule 89

<sup>28</sup> *Barone* at 40-41.

### 1.2.3 Constitutional Right to One Appeal

Prior to 1976, KRS §177.080 et. seq. contained eminent domain law. Under this statute, when right-to-take was at issue and the owner would be irreparably injured by an immediate loss of possession, they could ask for and were entitled to a temporary injunction at any time after an appeal to the circuit court was perfected.<sup>29</sup> — “In 1976, the Kentucky General Assembly enacted a new condemnation statute, the Kentucky Eminent Domain Act. KRS §416.540-416.680. The purpose of the act was to set up a new and uniform condemnation procedure.”<sup>30</sup>

In *Ratliff* the property owner wanted to appeal a trial court’s right-to-take decision. Previous eminent domain decisions held there was no right to an appeal.<sup>31</sup> *Ratliff* challenged the constitutionality of the current statute based on a newly amended section of the Kentucky Constitution which gave the right to one appeal in all civil and criminal cases (Ky. Const. §115). The amendment took effect January 1, 1976, shortly before the new eminent domain statute was passed. The new statute does not contain any specific “unequivocal statutory provision that permits an immediate appeal from the trial court’s ruling.”<sup>32</sup> Because courts must interpret a statute in a way that upholds its constitutionality, and Ky. Const. §115 was in effect when the new eminent domain act was drafted, the *Ratliff* decision observed “the provisions of KRS §416.610(4) referring to an interlocutory judgment ..., allows an immediate, *expedited* appeal, by the condemnee of the question of the condemnor’s right-to-take. There is no doubt but that a losing condemnor has this right also.”<sup>33</sup> Once an interlocutory judgment has been entered, the appeal time is 30 days and cannot be extended.<sup>34</sup>

The *Ratliff* decision noted that if the condemnor was given the right of immediate possession, but that decision was later overturned on appeal, the property owner could never be made whole again as the damage to the property would already be done. Likewise, the court was aware that the process of appealing this decision puts the condemnor in limbo. The ruling specified both the trial court hearing and the appeal should be “immediate and expedited.”<sup>35</sup> The question of whether entry upon the land sought for condemnation can proceed during the appeal is discussed later.

### 1.3 Conclusion

Kentucky constitutional and statutory law requires that a fair process be in place to let a property owner challenge a condemnor’s right to acquire private property, including a right to appeal the initial decision. Property acquired by a condemnor must be for public use, and property owners have the right to an immediate and expedited hearing on right-to-take. Two of these requirements stand regardless of statutory revisions: the requirement that property must be needed (i.e., not arbitrary) for public use, and the right to one appeal. These requirements will remain in place unless the Kentucky and US Constitutions are amended. The right to an expedited hearing is granted by statute and subject to statutory revisions.

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<sup>29</sup> *Stillpass v. Kenton Cty. Airport Bd., Inc.*, 403 S.W.2d 46, 48 (Ky. 1966).

<sup>30</sup> *Ratliff* at 38.

<sup>31</sup> *Cartmell v. Urban Renewal & Cmty. Dev. Agency*, 430 S.W.2d 649 (Ky. 1968), an urban renewal eminent domain case.

<sup>32</sup> *Ratliff* at 39.

<sup>33</sup> *Id.*, *emphasis added*

<sup>34</sup> *Hagg v. Ky. Utils. Co.*, 660 S.W.2d 680 (Ky. App. 1983)

<sup>35</sup> *Ratliff* at 39.

## Chapter 2 Survey of State Transportation Agencies

In 2020, we distributed a national survey on right-to-take issues confronting departments of transportation (DOTs). Eighteen attorneys from 14 states submitted responses — 14 came from state attorneys and 4 from private firms representing a state agency. Respondents had an average experience of 18 years litigating condemnation cases, with a range of 6 to 33 years. Appendix A provides all questions and full sets of survey responses.

### 2.1 Findings of the 2020 National Survey

Over the past three years, respondents reported fielding between 0 and 15 right-to-take challenges (mean = 2.28 challenges). Sixty percent of the attorneys said the number of right-to-take challenges is remaining stable, while 22% said the numbers are increasing and 11% felt frequencies are declining. The most often-cited reason for challenges was an allegation of inadequate compensation (n = 7), followed by objections to design plans (n = 4) an unfair process, bad faith negotiations, and property owners viewing the taking as unnecessary (n = 3). Insufficient environmental review, a lack of fairness in negotiations, lack of knowledge about the law, and a lack of public purpose were mentioned twice. Issues listed once included a failure to follow the law on negotiations, damage to access, incomplete design, poor treatment by the agency, an inability to find all the property owners, anti-government sentiment, a desire to keep the property, a violation of religious rights, an arbitrary and capricious decision to take the property, and a desire to use the challenge as leverage in litigation.

Sixty-five percent of respondents observed that the length of time between when a challenge is made and when the right of entry is obtained is six months or less. Twenty-nine percent of participants said the process lasts between six months and one year. Six percent reported that obtaining right of entry takes between 1.5 and 2 years after a challenge is made. One respondent, whose state has litigated only one challenge in the past three years, reported the case lasting over three years. The most common reasons for delay are court schedules and the collection and distribution of discovery materials. Other explanations cited include appeal time and *Other* (difficulty obtaining service, factual investigation of witnesses, and preparing exhibits). In terms of resolving right-to-take challenges, the most common tactics are monetary settlement and the category *Other* (29% for each). Encompassed in the category *Other* are motion practice; negotiations; and a variety of accommodations (letting the owner remain on the property for a certain period, modification of construction staging, access, or parking issues). Plan revisions and trials are the third most frequently used tools (21% for both). Common tools for expediting the process include a *rocket docket* (50%), plan revisions (33%), and *Other* (17%). Here, *Other* includes excluding issues about compensation from the right-to-take challenge and dismissing the petition and refiling (this requires payment of accrued attorney's fees). Mediation is also used to expedite the process but ranked within the second most frequent category of tools at 42%. Respondents said very few right-to-take challenges are resolved in favor of property owners (10% or less).



## Chapter 3 Current Practice and Process in Preventing & Resolving Right-to-Take Challenges in Kentucky

### 3.1 Pre-Condemnation Requirements

A condemnor<sup>36</sup> is a person or entity that seizes real and/or personal property via eminent domain.<sup>37</sup> Before a condemnation action is filed, the condemnor must attempt to reach an agreement with a property owner. All negotiations should be carefully documented. Negotiations are unnecessary when the owner (a) is unknown, (b) under [legal] disability<sup>38</sup> (in which case the guardian should be approached to negotiate), (c) or cannot be found after reasonable efforts are made.<sup>39</sup> In addition, the condemnor must acquire the property for a public use.<sup>40</sup> A document, such as an Official Order authorizing the project demonstrates the public-use requirement and should be referenced in the petition.<sup>41</sup> In preparing to condemn property, the condemnor or its agents have authority to enter the property to conduct studies, surveys, tests, soundings, and appraisals. But the owner must be notified at least 10 days prior to entry.<sup>42</sup>

To properly file a condemnation action, an attorney must prepare a packet of documents. Attorneys submit the following materials to the circuit court clerk when they file a condemnation action:

- Original petition
- Original full-sized plan sheets
  - One for the court file, one for use by commissioners, and one for the owner or their attorney of record
- A copy of the petition and an attached small size plan sheet(s) as an exhibit for every named defendant<sup>43</sup>
- A copy to obtain a stamp “filed” for the attorney’s record
- An Order to Appoint Commissioners
- Two blank Reports of Commissioners
  - One for the record, one for the commissioners to use when executing their duties
- Order to Pay Commissioners
- Three summons for each defendant
  - One for the attorney to keep stamped ‘tendered,’ one for delivery to the defendant, and one for the sheriff to return to the clerk after service is perfected

The attorney should also file a Notice of Lis Pendens with the county clerk immediately after filing the petition and accompanying documents. The attorney representing the condemnor must submit the necessary filing fee before

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<sup>36</sup> KRS §416.540 (2)

<sup>37</sup> KRS §416.540 (8)

<sup>38</sup> The negotiator should not attempt to make a psychological or medical decision about an owner’s ability to negotiate, even if the circumstances seem obvious. If the negotiator questions an owners’ ability to comprehend the agreement, they should seek legal advice before proceeding. Nor should the negotiator assume a family member can speak on behalf of that person. Legally, any person 18 years of age or older has the sole authority to either bind themselves to a contract or to appoint for themselves a power of attorney who can sign for them. This is the legal reality unless a person is determined to be unable to enter into contracts by the district court and has had a guardian appointed to act in their behalf pursuant to KRS § 387.500-387.800, Guardianship and Conservatorship for Disabled Persons.

<sup>39</sup> KRS §416.550

<sup>40</sup> KRS §416.540 (1) and (5) and *Ratliff* at 38.

<sup>41</sup> It may save time and argument, and perhaps deter right-to-take challenges if the attorney attaches the official order for the project as Exhibit B to the petition.

<sup>42</sup> KRS §416.560 (4).

<sup>43</sup> While failure to attach an exhibit is not fatal to the condemnor, it provides a controversy since the petition states there is an exhibit attached to the petition. See *McGehee v. Commonwealth*, No. 2008-CA-001568-MR, 2010 Ky. App. Unpub. LEXIS 128 (Ky. App. 2010).

the circuit court clerk will allow the case to be filed.<sup>44</sup> Failure to provide any of these items may delay obtaining right of entry.

“A petition seeking condemnation is required to contain those allegations necessary to show that the petitioner is entitled to exercise the right of eminent domain. KRS §416.570(1).”<sup>45</sup> A petition filed to initiate condemnation proceedings must be verified.<sup>46</sup> Typically, this is done by the attorney attesting to its veracity. Some attorneys recommend that an engineer or right-of-way agent verify its contents. The engineer can confirm the property description is accurate, avoiding future delay. The petition must allege facts sufficient to show that (a) the entity has condemnation powers, (b) the property is needed for public use, and (c) an attempt to negotiate with the owner was unsuccessful.<sup>47</sup> The petition must also give a *particular description* of the property and its current use.<sup>48</sup> The petition must also request that the court appoint commissioners to determine the amount of compensation the owner of the property is entitled to.<sup>49</sup>

Omitting any of the requirements when drafting condemnation petitions and filing condemnation cases will create a flaw in the pleading, opening an opportunity for a challenge, and delay moving the case toward a right of entry.

### 3.1.1 Pre-Filing Delays & Prevention of Right-to-take Challenges

The statutory requirement for a *particular description* typically does not create a problem. However, lacking a final or accurate description of the taking when the appraisal is completed or when the petition is prepared causes delays. If a discrepancy is discovered after the appraisal is completed an appraisal update is necessary. If a discrepancy is discovered after a petition is filed, an Amended Petition must be filed. If a description changes occur after the Commissioners’ Report is filed, the commissioners must reconvene and determine a new value.<sup>50</sup> If less property is needed, the property owner may agree to forego reappointment of the commissioners to determine a new Commissioners’ Award. Nonetheless, the petition and other pleadings must be revised to reflect the new description (a step which takes additional time).

Flawed title reports can result in the need to add parties after negotiations occur and is potentially grounds for a right-to-take challenge based on failing to negotiate with all owners before filing the condemnation suit. This challenge is not insurmountable if it was not done in bad faith, but it does delay the process.

A tool that could be used during this negotiation phase is a right of entry agreement. These agreements differ from an Agreed IOJ as they grant right of entry prior to filing the action while requiring the case be filed within a specific timeframe. Often, the right of entry agreement includes a provision for waiving formal service or process and can provide for posting the state’s offer in lieu of the Commissioners’ Award. This dramatically reduces the timeframe for right of entry because entry is immediate, and the risk of a right-to-take challenge is eliminated. These agreements also dispense with the time needed for service of process and/or the time needed for the commissioners to file a report.

In summary, failing to provide the appraiser with an accurate property description prior to the property appraisal and failing to provide the attorney an accurate description of the taking prior to suit being filed can create facts that may result in a right-to-take challenge. Another error or omission that requires time to correct is a lack of complete information on title and owners. Agreed IOJs and right of entry agreements are two valuable methods for reducing delay.

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<sup>44</sup> KRS §416.560 (3) and Ky. CR Rule 3.02.

<sup>45</sup> *Ratliff* at 38.

<sup>46</sup> KRS §416.570

<sup>47</sup> KRS §416.570 (1)

<sup>48</sup> KRS §416.570 (2)

<sup>49</sup> KRS §416.570 (3)

<sup>50</sup> *Charles Hamilton, Executor of the Estate of Ben Frank Robards v. Com., D.O.H.*, 799 S.W.2d 39, (Ky. 1990).

### 3.2 Post-Filing Delays Prior to a Right-to-take Challenge

The first step after filing a condemnation action is the appointment of commissioners.<sup>51</sup> The judge is statutorily responsible for this appointment, but the clerk can be directed to fill in the names on the Order and contact each commissioner. This is an area of potential delay as some counties delay the appointment or reports are not filed in a timely manner. Commissioners must be sworn before providing their service and have 15 calendar days from the date of their appointment to return a completed Report of Commissioners to the clerk.<sup>52</sup> If there is a mathematical or other error in the report, the attorney requests that the Court to reconvene the commissioners to make corrections. They must then file an Amended Commissioners' Report — which is time-consuming.

After the Commissioners' Report is filed, the clerk issues summons to each named defendant(s). The summons must include the amount of the Commissioners' Award.<sup>53</sup> A summons can be served by certified mail. For Kentucky residents it is served by sheriffs, coroners, jailers, or constables in the county where the person resides.<sup>54</sup> These individuals can also serve out-of-state defendants physically present in Kentucky.<sup>55</sup>

Out-of-state defendants or defendants whose location is unknown may alternatively be served by appointment of a warning order attorney who must attempt to locate and communicate with the defendant.<sup>56</sup> The duly appointed warning order attorney may also publish a notice of the action in a paper servicing the last known location of the defendant or the property's location. The warning order attorney has 50 days from the date of their appointment in which to file a report.<sup>57</sup> Defendants are considered constructively served 30 days after the warning order attorney's report is filed.<sup>58</sup> Out-of-state defendants may also be served by certified mail or personal delivery of a copy of the summons and petition by a person over 18 years of age. Such service without an appearance shall not authorize a personal judgment, but for all other purposes the person summoned shall be before the courts as in other cases of personal service.<sup>59</sup> The rules allow for attempts at both constructive and personal service.<sup>60</sup>

Because delays happen, no set timetable has been established to complete service of process. Once a party is served, defendants have 20 calendar days to file an Answer.<sup>61</sup> After a case is filed, any challenge to the right-to-take must be included in the Answer.<sup>62</sup>

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<sup>51</sup> KRS §416.580 (1).

<sup>52</sup> *Id.*

<sup>53</sup> KRS §416.590.

<sup>54</sup> Ky. CR Rule 4.01 and KRS §454.140, and KRS §454.210.

<sup>55</sup> KRS § 454.210 (2) (a) 6. and (3) (a) 2.

<sup>56</sup> According to Ky. CR 4.06 this requires an affidavit from the attorney requesting an appointment of a warning order attorney. It is often included in the condemnation petition, in which case verification that the property owner cannot be found will *necessarily* be a person with knowledge of the location or the unsuccessful steps taken in an attempt to locate the defendant, usually the right-of-way agent.

<sup>57</sup> See CR 4.07.

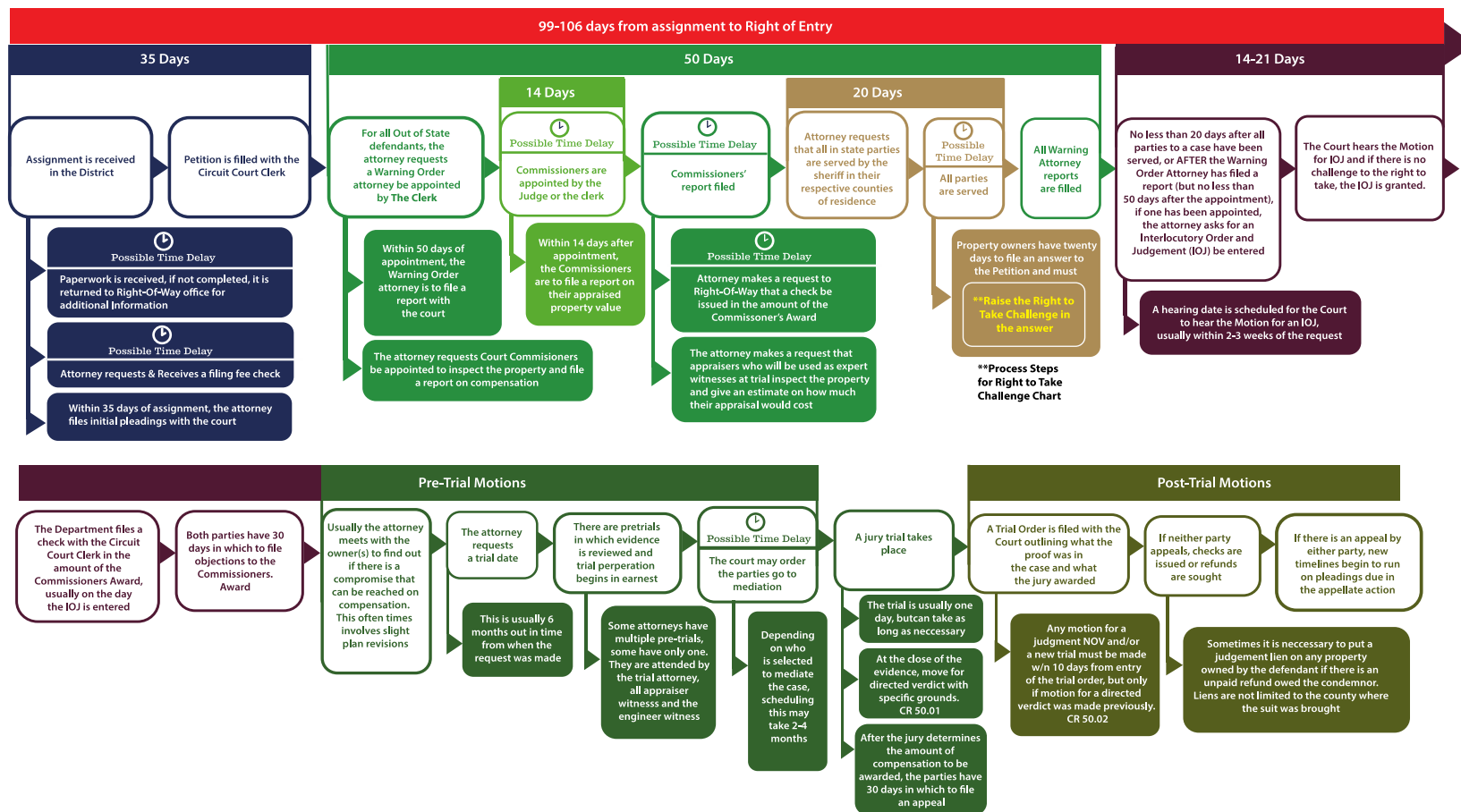
<sup>58</sup> Ky. CR 4.08.

<sup>59</sup> Ky. CR 4.04.

<sup>60</sup> Ky. CR 4.09

<sup>61</sup> Ky. CR 4.02

<sup>62</sup> KRS §416.600, KRS §416.610 (4)



**Figure 3.1** Approximate Timeline for Litigating Condemnation Cases

After a condemnation action is filed, delays may occur at several junctures, some of which lie beyond the litigating attorney's influence. There are no details on the length of and/or reasons for delays prompted by the appointment of commissioners, return of Commissioners' Reports, and service of process. Nor is it clear what the most efficient method is for obtaining service of process on both in-state and out-of-state defendants.

### **3.3 Litigation Delays During a Right-to-take Challenge**

Once a right-to-take challenge is raised, the parties begin discovery and identify evidence to present at the hearing, including documents and witnesses. Typically, both parties make a request to produce documents. Materials contained in the response to this request are commonly used as evidence. Unlike an open records request, which is limited to documents in the public domain and governed by statute, a request to produce documents can include any relevant information so long as it is not protected by executive, attorney-client, work product, or other privilege.<sup>63</sup> These documents pertain to project engineering, planning, right of way, and other areas. Materials include electronically generated or stored documents, printed documents, handwritten notes, calendars, phone messages, e-mails, drafts, and documents, and can be time consuming to collect. In addition to a request for documents, a Request for Answers to Interrogatories is a common tool in litigating right-to-take challenges. This is a set of questions asked of the opposing party to determine relevant facts.<sup>64</sup> Upon receipt of a Request for Production of Documents or Interrogatories, a party has a minimum of 30 days to respond.<sup>65</sup> If the goal is an expedited process, it is imperative to serve discovery requests as quickly as possible and to be prepared to deliver documents and answers quickly. A less commonly used, but perhaps more effective tool is the deposition of witness that may be called at the hearing.<sup>66</sup> Names of witnesses are usually discovered when documents are received and answers are delivered. Scheduling a time when the parties, their counsel, and the potential witness are available can cause delay.

Because court scheduling and obtaining a ruling after a hearing are frequent causes of delay, a best practice is to request a hearing date at the onset and work a discovery schedule back from that date. The request for the hearing date can include a request for an expedited hearing date. This may reduce the time it takes to achieve a resolution.

Experience litigating right-to-take challenges typically increases an attorney's ability to move cases forward. Training new attorneys could play a critical role in bringing a right-to-take challenges to a quick conclusion.

To review, one of the most common reasons for delayed right-to-take litigation is challenges associated with finding and efficiently collecting relevant documents for discovery. Discovery timelines are set out in the Ky. CRs and play a role in the right-to-take litigation timeline. The second most common cause of delay is court scheduling and judicial response time.

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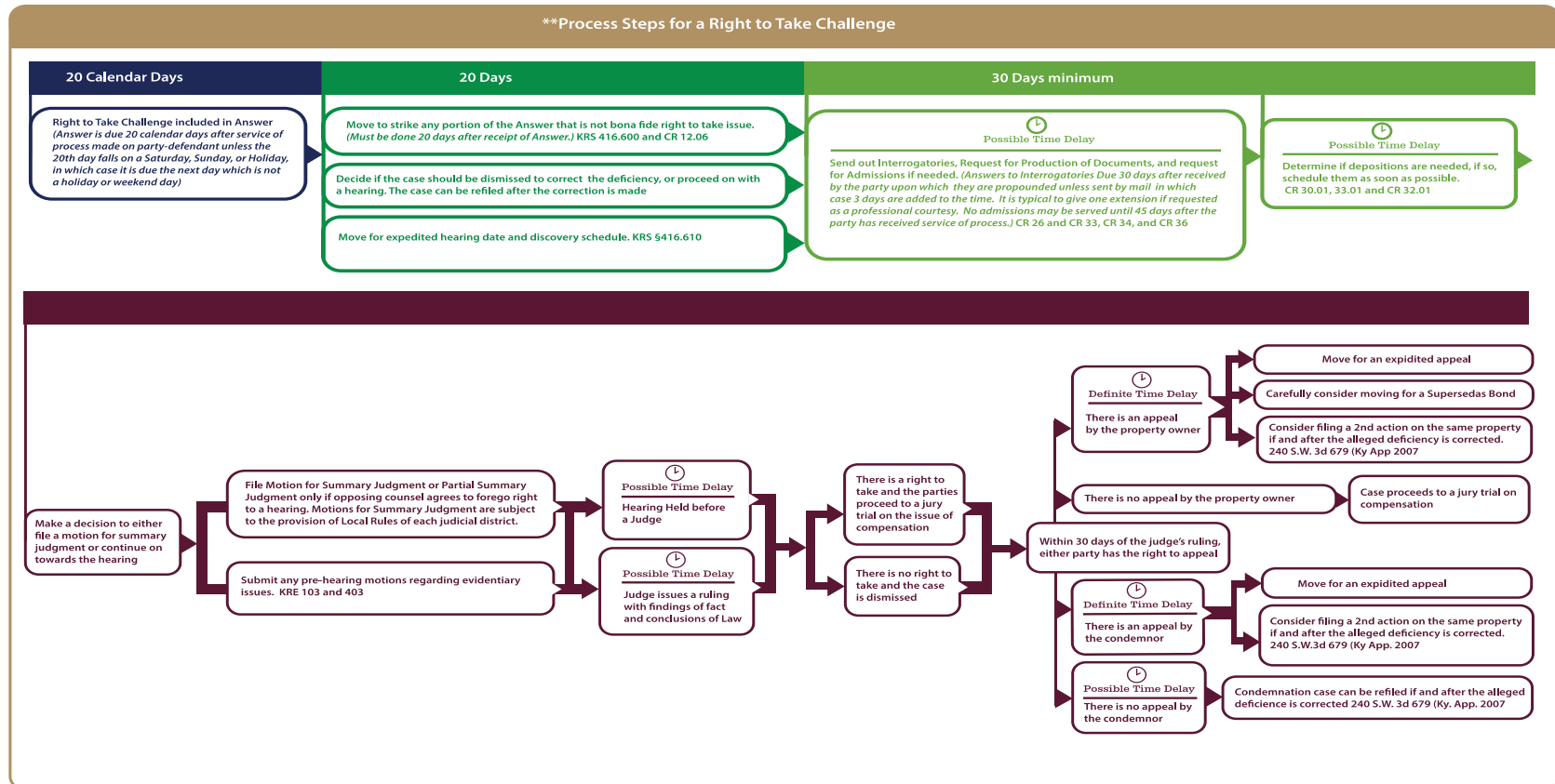
<sup>63</sup> Ky. CR 34.

<sup>64</sup> Ky. CR 33.

<sup>65</sup> Ky. CR 33.01 and 34.02.

<sup>66</sup> Ky. CR 30.





**Figure 3.2 Steps Involved in a Right-to-Take Challenge**

### 3.4 Appellate Delays

A speedy appeals process was recognized in both the *Ratliff* and the *Collins* cases. When the *Collins* court held that an injunction was not available because an adequate statutory remedy existed, the court noted: “It is essential, however, in order to defeat a suit for injunction on the ground of the existence of a statutory remedy, that the remedy so provided be *speedy, adequate, and complete*.”<sup>67</sup> However, the decision went on to caution:

The remedy provided by statute is detailed from the summons, through judgment, to final appeal in this Court. If pursued it could and would fully and completely determine the issue of necessity raised in this action and is therefore adequate. The statutory remedy is available from the time of summons and, on its face, is sufficiently *speedy*. *It is presumed that the trial judges will perform their duties and expedite business to meet the exigencies of matters pending.* With this kind of action on the part of the court together with the prompt action of the landowner when the remedy becomes available to him, there can be little doubt that the statutory remedy is full, speedy, complete and adequate. *However, should the wheels of justice turn too slowly to preserve the statutes quo, the owner, once having invoked the statutory remedy, may then ask for such equitable action as is necessary to preserve the rights intended to be preserved under the statute.*<sup>68</sup>

This case was decided under an older eminent domain statute that has since been repealed and replaced. Even so, it can be important to show this history of the issue if arguing for a speedy resolution of a right-to-take issue.

The *Ratliff* decision also insisted that the trial court and appellate court are obligated to expedite the process in condemnation cases:

We believe that the provisions of KRS 416.610(4) referring to an interlocutory judgment because of the above reason, allows an immediate, expedited appeal, by the condemnee of the question of the condemnor's right-to-take. There is no doubt but that a losing condemnor has this right also.<sup>69</sup>

In review, the Kentucky Supreme Court has affirmed the right to an expedited appeal — which right is granted by implication in the state’s Eminent Domain Act.

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<sup>67</sup> *Collins v. Commonwealth*, 324 S.W.2d 406, 409 (Ky. 1959) emphasis added.

<sup>68</sup> *Id.* emphasis added.

<sup>69</sup> *Ratliff, supra*. At 39.

## Chapter 4 Right-to-take Challenges and the Courts

### 4.1 Who Decides a Right-to-Take Challenge?

Once a right-to-take challenge is made, the condemnor has a right to an expedited hearing. As early as 1933 the Kentucky's highest Court ruled those decisions about whether a condemnor had met the requirements necessary to exercise the power of eminent domain is a question of law and not of fact.<sup>70</sup> Because juries adjudicate the accuracy of facts and judges resolve questions of law, the right of the condemnor to take property over the objection of the constitutionally protected person is an issue for a judge, not a jury.<sup>71</sup>

### 4.2 The Property Owner Must Prove the Taking was Arbitrary, done in Bad Faith, or an Abuse of Discretion

While KRS §416.540 et. seq. sets forth the procedure for condemnation cases, other statutes confer an agency's eminent domain authority. For example, KRS §177.081 confers to KYTC its eminent domain authority:

The Commonwealth of Kentucky, Department of Highways, when it has, by official order, designated the route, location, or relocation of a highway, limited access highway, bridge, roadside park, borrow-pit, quarry, garage, or other property or structure deemed necessary for the construction, reconstruction, or maintenance of an adequate system of highways, may, if unable to contract or agree with the owner or owners thereof, condemn the lands or material, or the use and occupancy of the lands designated as necessary. ... *The official order of the Department of Highways shall be conclusive of the public use of the condemned property and the condemnor's decision as to the necessity for taking the property will not be disturbed in the absence of fraud, bad faith, or abuse of discretion* (emphasis added).<sup>72</sup>

To prevail in a right-to-take challenge, a condemnor must meet a two-pronged test of necessity and public purpose (i.e., the property is desired for public use and will be reasonably necessary for that use).<sup>73</sup> Taking cannot be done arbitrarily (Ky. Const. § 2).<sup>74</sup>

#### 4.2.1 What Counts as Arbitrariness and Abuse of Discretion?

The Kentucky and United States Constitutions have been interpreted as preventing the government from arbitrarily exercising power. Ky. Const. §13 states that property cannot be taken by the government without the consent of a person's representatives. A good example of how this is accomplished is found in KYTC's process of project selection.

Kentucky road plans are reviewed by the state legislature and particular projects are included in a six-year highway plan. The executive branch then takes identified projects and develops plans for each. Prior to project initiation, the KYTC Secretary signs an official order that directs construction to proceed according to the plans. If the legislative branch determines a project is needed for public use, the executive branch is not acting arbitrarily when it develops a road plan to construct that project — it is fulfilling a legislative mandate.

If a condemnor has an official document specifying that property is needed for a for a public road project, condemnation of property needed for the project is not arbitrary. This position was tested in *Commonwealth Transp. Cabinet Dep't of Highways v. Taub*, 766 S.W.2d 49 (Ky. 1988), which involved acquiring land for a four-lane road that would also provide access to a proposed automotive plant. The trial court ruled in favor of KYTC on a right-to-take challenge. A divided Court of Appeals panel reversed this decision, finding that the Cabinet had not exercised the discretion entrusted to it by the General Assembly and the Official Order. The Kentucky Supreme Court reinstated

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<sup>70</sup> *Davidson v. Com., State Highways Commission*, 61 S.W. 2d 34, 36 (Ky. 1933).

<sup>71</sup> See *Duerson v. East Kentucky Power Co-op*, 843 S.W. 2d 340, 344 (Ky. App. 1992) and *Commonwealth v. Cooksey*, 948 S.W.2d 122 (Ky. App. 1997).

<sup>72</sup> KRS §177.081(1)

<sup>73</sup> *Proffitt v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 850 S.W.2d 852, 852 and 854 (Ky. 1993).

<sup>74</sup> *Id.*

the trial court's decision, holding that KYTC has broad discretion to determine necessity for acquiring land to build highways.

In their original conception, highway projects authorized by the legislative branch are *presumed* not to be arbitrary, and the property owner is saddled with the burden of overcoming that presumption. What facts will overcome this presumption?

According to case law, abuse of discretion does not mean a property owner can dictate how construction should be completed.

It, therefore, not being disputed that the land sought to be appropriated for borrow pits is necessary and requisite for the construction of a levee approach to the contemplated bridge and the authorized public agency (the state highway commission) having adopted that plan of approach, there exists no right in defendants to defeat the purpose of the condemnation by showing that other engineering devices might have been employed that would not have required the taking of their land, although it be one vastly more expensive, and which was not approved by the proper public agency as the most appropriate and wiser plan. We therefore conclude that this argument is also without merit.<sup>75</sup>

The *Davidson v. Com., State Highways Commission*, 61 S.W. 2d 34, 36 (Ky. 1933) judgment held that decisions about such matters are not reviewable by courts as such details are political — not judicial — decisions.<sup>76</sup> The decision in *Commonwealth, Dep't of Highways v. Burchett*, 367 S.W.2d 262, (Ky. 1963) emphasized that the details of road construction are not a question for the courts to determine and not a legitimate basis for a right-to-take challenge. At issue was the Highway Department acquiring land for waste disposal. Once the waste was deposited, the land surface would be even with the new highway and its value would increase. The property owners offered, at no cost to the public, temporary use of a nearby ravine as an alternative. Both locations were suitable for the intended purpose. In its decision, the court ruled: "The judicial power of government should not be invoked against the discretion of an agency of the executive branch in determining what is in the public interest, including what particular property is needed in connection with a valid public project, unless there is such a clear and gross abuse of that discretion as to offend the guaranty of Const. §2 against the exercise of arbitrary power."<sup>77</sup> In denying a right-to-take challenge the court stated:

It makes no difference that the department could have chosen another location or another plan for waste disposal. Probably any highway could be routed some other way. The state cannot reasonably be compelled to submit its administrative judgments to battle in every county courthouse. Cf. *Davidson v. Commonwealth ex rel. State Highway Commission*, 1933, 249 Ky. 568, 61 S.W.2d 34, 37. And if it be conceded that when the immediate purpose of the acquisition has been completed the state will be the owner of a valuable piece of property, so what? Is long-range planning by a governmental agency charged with the expenditure of astronomical sums of money to be regarded as *against* the public interest? Is the possibility that it may contemplate getting further use out of the property evidence of bad faith? On the question of "public necessity," is the highway department to be denied the exercise of prudence and foresight? Surely the answer is self-evident.<sup>78</sup>

The next year the court was asked to consider two different bases for a right-to-take challenge: bad faith negotiations and no necessity for the taking.

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<sup>75</sup> *Davidson v. Commonwealth*, 61 S.W.2d 34, 37 (Ky. 1933).

<sup>76</sup> *Id.*

<sup>77</sup> *Commonwealth, Dep't of Highways v. Burchett*, 367 S.W.2d 262, 266 (Ky. 1963).

<sup>78</sup> *Id.*

In *Commonwealth Dep't of Highways v. Vandertoll*, 388 S.W. 2d 358 (Ky. 1964) condemnation proceedings began pursuant to a work order that stated, “the interest of the public will be best served by the acquisition of the entire lot or tract.” Further, it noted the tract would be used for the highway and other necessary auxiliary facilities, including but not limited to connecting and frontage roads, elevation of adjustments, road crossings by overpass or underpass, drainage installation and roadside parks.<sup>79</sup> The taking of property unneeded for the roadway sparked a right-to-take challenge in addition to allegations of bad faith negotiations (based on the offer amount). The property owners knew of the road plans when they bought the property. The Department of Highways offered \$135,000 for the entire tract (the purchase price paid two months before), while the property owners countered with a \$260,000 offer to sell.<sup>80</sup> The *Vandertoll* decision held that there must be proof of fraud, bad faith, and abuse of discretion. Unless the condemning authority acted arbitrarily or in excess of its power, the judiciary cannot review the condemnor’s discretion:

... the judicial branch of government may not be called upon to question the discretionary power of an agency of the executive branch in order to determine what is in the public interest, including what particular property is needed in connection with a valid public project, unless there has been such a clear and gross abuse of discretion as to violate Section 2 of the Constitution of Kentucky, which section is a guaranty against the exercise of arbitrary power. In the case at hand, appellees failed to establish even a scintilla of fraud, bad faith, or abuse of discretion upon the part of appellant in its proceeding to condemn appellees' tract of land.<sup>81</sup>

In 1972 the Kentucky Court of Appeals determined that if an official order had not been entered designating a parcel as needed for a highway project, any action to condemn it is arbitrary. Only the Commissioner has the authority to make such a determination. It cannot be made at the engineering level:

We recognize the necessity to be able to make adjustments in plans, as they relate to the details of construction, but we cannot accept the proposition that land not officially designated for condemnation can be condemned simply on the basis of decisions at the engineering level. Nor are we convinced that it is administratively unreasonable to require that the official order be changed when a change in the plans calls for condemnation of land other than that designated in the original order.<sup>82</sup>

In *Proffitt v. Louisville and Jefferson County Metropolitan Sewer District*, 850 S.W.2d 852 (Ky. 1993) a property owner argued that failing to consider environmental concerns was tantamount to acting in an arbitrary and capricious manner. The Kentucky Supreme Court disagreed, noting there was no such duty articulated by the Kentucky Constitution or Kentucky statutes. Rather, the duty to consider environmental impacts is imposed by federal law. The Kentucky Supreme Court affirmed the judgment of the trial court to let the condemnation proceed.

Consistent with *Proffitt v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, the Court of Appeals held that a failure to strictly comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act does not negate a state agency’s right to condemn. However, the opinion cautioned:

[N]o authority has been cited for refusing the State its sovereign power of eminent domain because it has not complied with a federal statute or regulation limiting the conditions upon which federal funds will be granted to States. Read in context, the statute quoted above recites one of the conditions upon which federal funds are to be granted to states on particular highway projects. If a state does not see fit to comply with this condition, its right to federal funds may be questioned,

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<sup>79</sup> See *Commonwealth Dep't of Highways v. Vandertoll*, 388 S.W.2d 358, 359 (Ky. 1964).

<sup>80</sup> See *Id.* at 359.

<sup>81</sup> *Vandertoll* at 359-360.

<sup>82</sup> *Commonwealth, Dep't of Highways v. Salmon Corp.*, 489 S.W.2d 32, 34 (Ky. 1972).



but its right to proceed within its own borders under its own laws without federal funding is not impaired by the above statute.

The enforcement of [the federal statute] is not the responsibility of a state court in eminent domain proceedings, but rather that of federal agencies disbursing federal funds and, if necessary, that of the federal courts by injunctive control of such agencies.<sup>83</sup>

#### **4.2.1.1 Abuse of Discretion Due to Lack of Public Use**

Eleven years after *Burchett* Kentucky's highest court (at that time the Court of Appeals) held that if land is not acquired for public use, the decision concerning acquisition was one of individual preference or convenience (i.e., arbitrary). *Coke v. Com., Department of Finance*, 502 S.W. 2d 57 (Ky. 1974) dealt with the Kentucky Mansion Preservation Foundation, Inc., a private non-profit organization raising funds to help the Department of Finance acquire property. There was evidence that the foundation would be used to help restore and maintain the property, and that it might even be given some management functions. This argument failed. In explaining their decision, the court observed:

The evidence did not establish, however, that the *ownership* of the property would not be retained by the state or that the property would not retain its status as a state park or shrine. The fact that the foundation might be given some management functions does not mean that the property will not be devoted to state use, any more than is the case where facilities in a public park are leased or a contract is made with a private company to operate a restaurant in a state office building.<sup>84</sup>

Perhaps the strongest language written on the topic of public use is found in the decision for *Miles v. Dawson*, 830 S.W. 2d 368 (Ky. 1991). The case focused on a 15-acre tract purchased via condemnation to widen the outer loop of I-65. After title was conveyed, the state's plans changed and only 69% of the condemned acreage was used for the construction project, leaving almost five acres unused for the originally contemplated public purpose. Five years later, the property owner requested the state let her repurchase the unused portion pursuant to K.R.S. § 416.670. The state intended to convey the unused portion to a church as part of an agreed settlement in another condemnation action. The property owner brought an action for a declaration of rights, and the circuit court dismissed her case. The Supreme Court held:

The power to condemn property is an awesome power. *City of Owensboro v. McCormick*, Ky., 581 S.W.2d 3, 5 (1979) stated in part:

Naked and unconstitutional governmental power to compel a citizen to surrender his productive and attractive property to another citizen who will use it predominantly for his own private profit just because such alternative private use is thought to be preferable in the subjective notion of the governmental authorities is repugnant to our constitution whether they be cast in a fundamental fairness component of due process or in the prohibition against the exercise of arbitrary power.

Here the State stipulated that 30 percent of the condemned property was not needed. No further public use as originally contemplated by the State was undertaken, and the State attempted to transpose a broad public necessity argument to support its transfer of the property to another private party, the church. The denial of the repurchase request by Miles was based entirely on the theory of convenience to the State in settling other litigation with Evangel. It has been previously noted by this Court that mere convenience is not a sufficient justification for the condemning

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<sup>83</sup> *Kuchle Realty Co., LLC v. Commonwealth*, 571 S.W.3d 95, 101-02 (Ky. App. 2018) citing *Cty. Highway Comm'n*, 61 Tenn.App. at 304-05, 454 S.W.2d at 129.

<sup>84</sup> *Coke v. Com., Department of Finance*, 502 S.W. 2d 57, 60 (Ky. 1974).

authority to act as a land broker for private interests. Cf. *Commonwealth, Dept. of Transportation v. Knierem*, Ky., 707 S.W.2d 340 (1986).<sup>85</sup>

In denying the right to condemn, the Supreme Court found that the Department of Highways was attempting to use the undeveloped tract as an object of barter because it helped settle other litigation involving the project. This was not a proper public use.

A public use argument was also proffered in *God's Center v. Lexington Fayette Urban County Government*, 125 S.W.3d 295, (Ky. App. 2002). The challenge was unsuccessful. God's Center challenged the condemnation proceeding initiated by the Lexington Fayette Urban County Government (LFUCG), arguing that LFUCG's intended acquisition was for private use. A private non-profit pursued the involvement of LFUCG for restoring and using the Lyric Theatre as a cultural center. God's Center asserted that the LFUCG's stated public purpose of historic preservation and use of the building as a cultural center could be accomplished without title ownership (e.g., through granting a historic easement and God's Center's willingness to allow other groups to use the building). In keeping with prior decisions, the opinion cautioned:

The condemnor's decision on the amount of land to be condemned will be disturbed only if it is unreasonable in relation to the public interest or welfare involved and the condemnor may consider the future, as well as the present, needs for the taking.<sup>86</sup>

The decision observed that the trial court found that God's Center had failed to produce any evidence beyond speculation that the LFUCG intended to involve the Lyric Foundation/Second District Retirees in operating or managing a restored Lyric Theatre. The trial court also found that God's Center failed to produce evidence that LFUCG intended to convey ownership of the Lyric Theatre to a private entity. Instead, LFUCG sought input from the community by holding several open community meetings in addition to the meetings with the Lyric Foundation. The decision noted, "While the goals and function of God's Center may be laudable, it is not unreasonable for the LFUCG to seek the ability to control the Lyric Theatre for a more diverse, broad-based public use free from potential repeated conflicts that could arise from the need to gain God's Center's approval."<sup>87</sup>

#### **4.2.1.2 Public Necessity versus Public Use**

*Sturgill v. Commonwealth*, 384 S.W.2d 89 (Ky. 1964) presents an early example of how courts approach the analysis of arbitrary power. The case dealt with taking a landowner's property to build an access road to another person's property. The court reasoned:

Any public way naturally confers a special benefit on those persons whose property adjoins it. All roads terminate somewhere. Dead end streets or highways inevitably and particularly subserve the private interests of the last property owner on the line. Yet the public has an interest in reaching other members thereof. As a practical matter, the right of condemnation for highway purposes could not be made to depend upon the predominance of the public interest over private benefit. This is too fine a line even for legal draftsmanship. If this consideration were a determining factor, the condemnor would endlessly be forced to "battle in every county courthouse", See *Commonwealth v. Burchett*, Ky., 367 S.W.2d 262, 266. The accepted test is whether the roadway is under the control of public authorities and is open to public use, without regard to private interest or advantage.<sup>88</sup>

The *Sturgill* decision identified several parts of a "comprehensive and complex highway construction plan" believed to be outside the purview of judicial review. For example, "[p]roblems of necessity, proper design, best utilization of

<sup>85</sup> *Miles v. Dawson*, 830 S.W. 2d 368, 370 (Ky. 1991).

<sup>86</sup> See *God's Ctr. Found. v. Lexington-Fayette Urban Cty. Gov't*, 125 S.W.3d 295, 300 (Ky. App. 2002).

<sup>87</sup> *Id.* at 302-303.

<sup>88</sup> *Sturgill v. Commonwealth*, 384 S.W.2d 89 (Ky. 1964), but see *Com., D.O.T., v. Knierem*, 707 S.W. 2d 340, (Ky. 1986).

adjoining properties, convenience to the public, saving of expense, and promotion of traffic safety are matters which must be left to the discretion of the highway authorities. [S]pecific details of the plan cannot be called in question, from the standpoint of necessity or public use, except, upon a showing of fraud, bad faith or abuse of discretion.”<sup>89</sup> Many of those remain outside the boundaries of judicial review. Interpretation of cases like this has evolved. *Sturgill* is consistent with *Pike Cty. Bd. of Educ. v. Ford*, 279 S.W.2d 245, 248 (Ky. 1955) which held that “...courts will not interfere with the proposed plans unless there is positive proof of fraud, collusion or a clear abuse of discretion. The obligation of locating school sites rests with the County Board of Education. It is not for the courts to say whether the Board has acted wisely or unwisely in determining where the school should be located. The only question for the courts' determination is whether the Board is exceeding its authority or is acting arbitrarily.”<sup>90</sup>

*City of Bowling Green v. Cooksey*, 858 S.W. 2d 190 (Ky. App. 1992) offers a more recent example of an arbitrary decision based on public use. The decision ultimately went against the condemnor. The case dealt with the Airport Board attempting to condemn property “to establish a safety zone, among other public purposes and uses.” Evidence revealed that land would be used solely for a buffer zone with no current or future proposed structures located within property boundaries. The property owner offered to restrict his land to agricultural use, give the airport a noise easement and/or an easement prohibiting trees, residential development, and the erection of any structures on the property up to the airport’s building restriction line. The Airport Board, in turn, offered to lease the property back to the property owner with the same restrictions after it acquired a fee simple title. Recall that *Burchett* included a caveat holding that the judiciary would not review the discretionary power of an agency “... unless there has been such a clear and gross abuse of discretion as to violate Section 2 of the Constitution of Kentucky.” This case presented an example of the situation *Burchett* warned against. The trial court distinguished between the concept of necessity, which is determined by the legislature, and public use, which is determined by the courts. The Court of Appeals denied the condemnation finding which held there was no legitimate public purpose in acquiring the land. In denying the Airport Board’s right to condemn the court noted:

Under KRS 416.550 the condemnor cannot acquire the property in fee simple if it can obtain access or use of the property through other privileges or easements. The evidence not only reveals that there is no intended public use but also a willingness on the part of Cooksey, the owner/condemnee, to give the airport an easement and restrict the area in question from any building.<sup>91</sup>

A subsequent decision affirmed this reasoning: “Rather, it was decided that if the target property could be utilized through non-possessory means such as a privilege or easement—the ownership interest sought must reflect that limited utility.”<sup>92</sup> *Cooksey* was also seen as a failure to negotiate in good faith.<sup>93</sup> *Cooksey* was the first of several recent decisions indicating courts’ willingness to weigh in on public use or purpose arguments.

In *Lexington-Fayette Urban Cty. Gov't v. Moore*, 559 S.W.3d 374 (Ky. 2018) the Kentucky Supreme Court affirmed the *Cooksey* decision — this time in favor of the condemnor. The condemnor sought a permanent easement while the property owner argued there should have been a fee simple taking. The condemnor argued it should not be saddled with ownership of small tracts of land which require ongoing maintenance when a permanent easement serves the public purpose. The court agreed:

We, accordingly, reaffirm the *Cooksey* rule because it accurately reflects the public policy implicit in KRS 416.550. We reiterate that when a governmental unit needs to take a small area out of a larger estate, it should take the least possible interest, such as an easement, so that if the public

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<sup>89</sup> *Id.*

<sup>90</sup> *Pike Cty. Bd. of Educ. v. Ford*, 279 S.W.2d 245, 248 (Ky. 1955).

<sup>91</sup> *City of Bowling Green v. Cooksey*, 858 S.W.2d 190, 192 (Ky. App. 1992).

<sup>92</sup> *City of Audubon Park v. Louisville Reg'l Airport Auth.*, No. 2016-CA-000059-DG, (Ky. App. 2017) Unpub. LEXIS 772, at \*6.

<sup>93</sup> *Cooksey* at 192.

purpose for the tract is concluded, it may be reintegrated into the original estate unburdened by the prior public taking.<sup>94</sup>

The ruling in *Sprint Communications Company, L.P. v. Albert E. Leggett, III (As Trustee of the Albert E. Leggett Family Trust*, 307 S.W.3d 109, (Ky. 2010) serves as a warning to condemnors that egregious conduct such as posturing as a condemnation action can become a civil rights action under 42 USC § 1983 and an abuse of process action. Before condemnation, Sprint attempted to purchase the Leggett property, but the property owner refused the offer. During negotiations the agent repeatedly warned that without an agreement, a condemnation action would be filed, requiring time and legal costs. When no agreement was reached Sprint filed an action seeking to take a permanent utility easement over a .5-acre tract of land which included a photography studio. The company planned to raze the building and build a facility to house computers, generators, and other equipment. Leggett raised a right-to-take challenge and countersued, arguing that Spring had abused the process and was attempting to take property in violation of the federal and state constitutions. Sprint only had statutory authority to condemn for utility lines — not a company facility. Sprint moved to dismiss the condemnation action thinking that would eliminate the counterclaims as well. It did not. The Supreme Court affirmed the Court of Appeals decision allowing the counterclaims to proceed against Sprint although the condemnation action had been dismissed.

#### **4.2.1.3 Public Benefit versus Public Use**

In *Owensboro v. McCormick*, 581 S.W.2d 3, 5 (Ky. 1979), the Kentucky Supreme Court examined the difference between public benefit and public use. The case involved the City of Owensboro attempting to condemn land for economic development in accordance with the Kentucky Local Industrial Development Act. The court identified its ability to distinguish between public use and public benefit in the Constitution:

The Kentucky Constitution, particularly Sections 13 and 242, has been interpreted repeatedly to prohibit the taking of private property for public use without compensation, and this prohibition has been consistently construed to forbid the taking of private property for private uses. 29A C.J.S. *Eminent Domain* § 29, at 251 (1965). Both of these sections of our Constitution carefully use the term "public use" as contrasted with Section 171 of the same Constitution that commands taxes be levied and collected for "public purposes" only.<sup>95</sup>

The decision turned on whether the Kentucky Local Industrial Development Act constitutes public use of private lands condemned under its authority. The City argued the court should regard public benefit as an equivalent to public use and urged the Court to adopt an expansive definition of public purpose, one which would include the issuance of revenue bonds by a city or county to acquire industrial property. It would also include instances where public funds spent to promote industrial development by attracting new industry to all parts of the state.<sup>96</sup>

Affirming a ruling by the Court of Appeals, the Kentucky Supreme Court held that the Kentucky Local Industrial Authority Act is unconstitutional insofar as it grants a city or other governmental unit the unconditional right to condemn private property which is to be conveyed for private development for industrial or commercial purposes. Citing the Court of Appeals the Supreme Court found, "No 'public use' is involved where the land of A is condemned merely to enable B to build a factory or C to construct a shopping center."<sup>97</sup> This reasoning guarantees Kentucky

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<sup>94</sup> See also *Kroger Co. v. Louisville & Jefferson Cty. Air Bd.*, 308 S.W.2d 435, 439 (Ky. 1957) which held "The general rule is well stated in 18 Am.Jur., Eminent Domain, Section 109, page 736, in this language: "The grantee of the power of eminent domain may ordinarily exercise a large discretion not only in respect of the particular property, but also as to the amount of land to be taken for the public purpose. This discretion is not reviewable by the courts, unless, possibly, where there has been a gross abuse or manifest fraud." *Lexington-Fayette Urban Cty. Gov't v. Moore*, 559 S.W.3d 374, 381 (Ky. 2018).

<sup>95</sup> *Owensboro v. McCormick*, 581 S.W.2d 3, 5 (Ky. 1979).

<sup>96</sup> See *Id.*

<sup>97</sup> *Owensboro*, *supra*. 3, 7-8.

property owners will never be placed in the precarious position that property owners in the infamous United States Supreme Court case of *Kelo v. City of New London*, 545 U.S. 469, 125 S. Ct. 2655 (2005) found themselves in. The City of New London condemned a middle-class neighborhood to let a drug company build a facility there. The court ruled that the public benefit of an increased tax base was sufficient reason to let the condemnations proceed. Five years after the *Kelo* decision the drug company moved to a neighboring town. Ten years after the decision, a large portion of the condemned land remained vacant.

A recent case again highlighted the differences between public use and public benefit. In *Crain v. Hardin Cty. Water Dist. No. 2*, No. 2015-CA-000499-MR, 2016 Ky. App. Unpub. LEXIS 416, (Ky. App. 2016) property owners conveyed an agricultural conservation easement to the PACE Corporation, an independent municipal corporation attached for administrative purposes to the Kentucky Department of Agriculture. The corporation holds titles to agricultural conservation easements purchased by the Commonwealth to restrict or prevent the development or improvement of land for purposes other than agricultural production. PACE corporation also receives funds from a USDA program. As such, the USDA had a contingent right to enforce the easement. When the water district sought to condemn land owned by the Crains which had an overlaying PACE easement, the Crains raised a right-to-take challenge arguing that the agricultural conservation easement precludes any taking for a non-agricultural purpose. The Court of Appeals unanimously held that a public benefit is different than a public use and a public benefit does not preclude condemnation:

Under the terms of the agricultural conservation easement, neither the Commonwealth nor the public is granted a right to come onto the Crains' property. Rather, the Commonwealth simply obtained the right to restrict certain future development of the property. While this is clearly a public purpose, we agree with the trial court that it does not constitute a prior public use of the property. Therefore, the trial court did not err in allowing the District's condemnation petition to proceed.<sup>98</sup>

#### 4.2.1.4 What Does and Does Not Constitute Bad Faith?

Right-to-take challenges based on bad faith allegations typically focus on pre-condemnation negotiations. A ruling from the late-1800s affirmed the requirement to negotiate in good faith before condemning property. The *Portland & G. Tpk. Co. v. Bobb*, 88 Ky. 226, 229-31, 10 S.W. 794, 795-96 (Ky. 1889) decision noted, "If the land be not necessary for its use it cannot, under the statute, condemn it; nor can it do so unless it has first, in good faith, made an effort to obtain it by contract. They are conditions precedent to the exercise of the right of condemnation."<sup>99</sup> These things are required because:

The sovereign power vests it for certain purposes, and with a view to a public service, with the power of eminent domain; but it does so upon certain conditions, and with these it should strictly comply in view of the extraordinary power given to it over the property of the citizen.<sup>100</sup>

*Pike County Board of Education v. Ford*, 279 S. W. 2d 245, (Ky. 1955) centered on a right-to-take challenge based on allegations of bad faith. In that case a school board sought to condemn property for a new school. The owner moved to set aside the verdict and dismiss the condemnation petition because the low value used to make an offer on the property constituted bad faith. The Court of Appeals held:

The appellees argue also that the Board did not make a bona fide effort to purchase the property. We have indicated that a "take it or leave it" offer is not a good faith offer. *Paducah Ice Mfg. Co. v. City of Paducah*, 289 Ky. 31, 157 S. W. 2d 490, 491. It is true that the Board's offer of \$5,000 was

<sup>98</sup> *Crain v. Hardin Cty. Water Dist. No. 2*, No. 2015-CA-000499-MR, 2016 Ky. App. Unpub. LEXIS 416, at 14 (Ct. App. June 17, 2016).

<sup>99</sup> *Portland & G. Tpk. Co. v. Bobb*, 88 Ky. 226, 229-31, 10 S.W. 794, 795-96 (Ky. 1889). See also *Howard Realty Co. v. Paducah & I. R. Co.*, 182 Ky. 494, 498, 206 S.W. 774, 776 (Ky. 1918).

<sup>100</sup> *Id.*



decidedly inadequate, but the matter was left open for further negotiation. The letter wherein the offer was made contained this statement: "If Mrs. Ford and her son feel that they can make some offer with some degree of reasonableness attached thereto, we shall be happy to receive and consider their offer." That was not a "take it or leave it" offer, but a request for a reasonable offer in return. We are unable to conclude, as a matter of law, that there was no good faith effort to negotiate.<sup>101</sup>

This case is important because of the instruction it provides to right-of-way negotiators. On occasion, right-of-way contact notes written by negotiators will indicate the property owner requested a counteroffer and was told the agency does not make counteroffers. This can result in a right-to-take challenge based on an allegation that the owner was given a take it or leave it offer. This type of challenge can and should be avoided by heeding the advice indicated above and reaffirmed with a follow-up letter. Agents should be directed to make the letter language situation specific.

Seven years after the *Ford* decision the Kentucky Supreme Court made it clear that state agencies should be given deference when a property owner challenges the right to condemn property. In *Com., D.O.H. v. Fultz*, 360 S.W. 2d 216 (Ky. 1962) thirteen cases were consolidated after one went to trial, resulting in a jury verdict the Department of Highways thought was excessive. The Department also thought the Commissioners' Awards in pending suits were too high and eventually issued an Official Order abandoning the project. All pending suits on the project were dismissed (without prejudice to allow the suits to be refiled) and attempts to acquire any additional property were frozen. The Department began renegotiating and issued an order reinstating the first official order while cancelling the one abandoning the project. The next year the Department filed new suits to acquire property on the project. Property owners argued the old suits barred the new ones and that the Department had not acted in good faith in abandoning the old suits. They also argued the Department was bound by the jury verdict in the one case that had gone to trial. The trial judge dismissed the new suits by ruling that there was never an unconditional good faith abandonment of the project or of the old suits. The Supreme Court saw it differently noting that, "Good faith is, of course, strictly a matter of intention as of the time the action in question was taken." The ruling explained:

We think that the official actions of a state officer at cabinet level, especially when coupled with his word under oath, *must be given a strong presumption of good faith, rebuttable only by evidence of the most convincing weight and character*. Naturally the rebutting evidence in such a case will be circumstantial, as it was in this case, *but if the circumstances shown are equally consistent with either good faith or bad faith at the time of the official action, our opinion is that they are not enough to sustain a case of bad faith* [original emphasis].<sup>102</sup>

Since then, other cases have alleged bad faith as a basis for a right-to-take challenge. For the most part, they have not been successful. For example, in *Usher and Gardner, Inc. v. Mayfield Ind. Bd. of Ed.*, 461 S. W. 2d 560, (Ky. 1971) the decision held that refusing an absurd counteroffer is not bad faith by noting that "A single take-it-or-leave-it offer of a manifestly inadequate amount could well evidence a failure to make a reasonable effort to acquire the land by contract of private sale."<sup>103</sup> This is consistent with a subsequent decision in *Coke v. Com., Commissioner of Parks*, 502 S.W. 2d 57 (Ky. 1974) where the Supreme Court ruled a condemnor is not required to haggle with an owner during a negotiation.<sup>104</sup> An offer made without benefit of a survey or appraisal is not sufficient proof of bad faith.<sup>105</sup> According to the courts, lack of experience on the part of the negotiator or making an offer without an

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<sup>101</sup> *Pike County Board of Education v. Ford*, 279 S. W. 2d 245, 249 (Ky. 1955).

<sup>102</sup> *Pike County Board of Education v. Ford*, 279 S. W. 2d 245, 249 (Ky. 1955); *Com., D.O.H. v. Fultz*, 360 S.W. 2d 216, 222 (Ky. 1962).

<sup>103</sup> *Usher & Gardner, Inc. v. Mayfield Indep. Bd. of Educ.*, 461 S.W.2d 560, 562-63 (Ky. 1970).

<sup>104</sup> See also *Eaton Asphalt Paving Co. v. CSX Transp.*, 8 S.W.3d 878 (Ky. App. 1999).

<sup>105</sup> *Vincent v. City of Powderly*, unpublished, WL 22025850, (Ky. App. 2003).

appraisal does not rise to the level of bad faith.<sup>106</sup> A condemnor refusing to accept a property owner's legal argument during negotiations is not bad faith.<sup>107</sup>

Note, the remedy for denying a right-to-take based on a finding of bad faith negotiations is dismissal of the case. The condemnor is free to begin negotiations anew and refile if negotiations are unsuccessful.<sup>108</sup>

Another line of right-to-take challenges based on a bad faith argument involved an allegation that the condemnor lacked everything needed to allow a project to move forward. In *N. Ky. Port Auth., Inc. v. Cornett*, 625 S.W.2d 104 (Ky. 1981) the project required an approved permit from the U.S. Army Corps of Engineers to operate a riverport. The condemnor applied for the permit, but it was not approved. The property owner alleged bad faith since there was no certainty that the project would proceed. This was a case of first impression for Kentucky's courts. Although there was no proof submitted that the permit would not be awarded and the condemnor asserted it believed permission would be forthcoming, both the trial court and the Court of Appeals ruled against the condemnor. The Kentucky Supreme Court did not agree, citing holdings from two different states:

Action must be tempered with wisdom. Is it wise, proper, or necessary that this court construe the statutes applicable to the present condemnation proceeding so narrowly that we defeat the very purpose for which the statutes were adopted? It is not conceivable that all phases of the development of the riverport be completed simultaneously or completed within a reasonable time, one from the other, before condemnation proceedings may be instituted. In *Sellors v. Town of Concord*, 329 Mass. 259, 107 N.E.2d 784 (1952), the Supreme Judicial Court of Massachusetts said:

" . . . That a possibility exists that the land may not be devoted to the proposed uses cannot be denied. But in the absence of evidence that the town cannot reasonably expect to achieve its public purposes, we cannot deny its right-to-take land by eminent domain. Obviously in the carrying out of the projects contemplated by the town many steps must be taken, and they cannot all be taken at once. The town would hardly be in a position to ask the board of appeals for permission to use the land for municipal purposes before it had acquired the land . . . ." 107 at 786.

In *Falkner v. Northern States Power Co.*, 75 Wis.2d 116, 248 N.W.2d 885 (1977), the Supreme Court of Wisconsin considered a challenge to eminent domain proceedings on the basis that it is conceivable that the land may not be used. In disposing of this issue, the court wrote:

" . . . There will always be some possibility that a planned improvement will not be completed and put to the use intended. The test cannot be whether it is possible, whether it is conceivable that the project would fail. The test must be whether there is a reasonable assurance that the intended use will come to pass. If there is reasonable probability that the public utility will comply with all applicable standards, will meet all requirements for the issuance of necessary permits, and will not otherwise fail or be unable to prosecute its undertaking to completion, there is a right of condemnation." 248 N.W.2d at 893.

The condemnor has acted in good faith, with a reasonable assurance that the project will come to pass. *N. Ky. Port Auth., Inc. v. Cornett*, 625 S.W.2d 104, 105 (Ky. 1981).<sup>109</sup>

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<sup>106</sup> *Crain v. Hardin Cty. Water Dist. No. 2*, No. 2015-CA-000499-MR, Unpub. LEXIS 416, (Ky. App. 2016); See also *Milam v. Viking Energy Holdings, LLC*, 370 S.W.3d 530 (Ky. App. 2012).

<sup>107</sup> *Eaton Asphalt Paving Co. v. CSX Transp.*, 8 S.W.3d 878 (Ky. App. 1999).

<sup>108</sup> *Golden Foods, Inc. v. Louisville & Jefferson County*, 240 S.W.3d 679, (Ky. App. 2007).

<sup>109</sup> *N. Ky. Port Auth., Inc. v. Cornett*, 625 S.W.2d 104, 105 (Ky. 1981).

Proof of gross abuse or manifest fraud is required to deny the right-to-take.<sup>110</sup> In applying that the reasonable assurance standard of review, facts of gross abuse were found in the case of *BIF, Inc. v. Cty. Of Campbell*, No. 2007-CA-000047-MR, Unpub. LEXIS 858, (Ky. App. 2007):

The court concluded that following the loss of federal funding, TANK had not taken any steps to develop alternative plans for the transit center, nor had it developed a financial plan or appropriated funding for the project. Further, the court noted that the substantial changes to the project without approval from TANK's Board or the Campbell County Fiscal Court was evidence of "gross abuse," and was sufficient grounds for denying TANK's condemnation petition.<sup>111</sup>

However, courts have not been willing to rule that initiating a condemnation action before obtaining funding is bad faith on its face.

While the court did not address the materiality of the issues concerning the timing of Board approval for funding of the project, and the project's absence in WKU's "Master Plan," nonetheless, the Clarks fail to provide any authority, as required by CR 76.12, to support its contention that this action, or inaction, on behalf of WKU evinces bad faith so as to disturb the deference we afford to the court's findings on appeal. As a result, we decline to address the merits of this claim.<sup>112</sup>

An experienced practitioner of condemnation cases often knows with a degree of certainty what appellate courts will consider as good or bad faith actions. In clear instances of good faith, it may be acceptable to consider a strategy that would allow for entry onto the property during the appeal. This strategy is considered in Section 5.7.

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<sup>110</sup> *Com., D.O.H. v. Cooksey*, 948 S.W. 2d 122, 123 (Ky. App. 1997).

<sup>111</sup> *BIF, Inc. v. Cty. Of Campbell*, No. 2007-CA-000047-MR, Unpub. LEXIS 858, at \*5 (Ky. App. 2007).

<sup>112</sup> *Clark v. Bd. Of Regents of W. Ky. Univ.*, 311 S.W.3d 726, 730 (Ky. App. 2010).

## Chapter 5 Beneficial Strategies

This chapter reviews eight potential strategies available to condemnation practitioners which may accelerate the handling of right-to-take challenges or reduce the amount of time needed to obtain right of entry. None require statutory changes.

### 5.1 Right of Entry Agreements

Right of entry agreements are authorized by 49 CFR §24.102(j) which reads:

(j) Payment before taking possession. Before requiring the owner to surrender possession of the real property, the Agency shall pay the agreed purchase price to the owner, or in the case of a condemnation, deposit with the court, for the benefit of the owner, an amount not less than the Agency's approved appraisal of the fair market value of such property, or the court award of compensation in the condemnation proceeding for the property. In exceptional circumstances, with the prior approval of the owner, the Agency may obtain a right-of-entry for construction purposes before making payment available to an owner. (see appendix A, § 24.102(j).)

The regulation requires exceptional circumstances, as well as owner approval, and sanctions entry before making payment to the owner and solely for the purpose of construction. This logically enables an agreed right of entry prior to obtaining an IOJ and filing suit. We found no cases that elucidate the phrase *exceptional circumstances*, likely because this tool involves the property owner's consent, which by its nature would avoid controversy.

Agreement details can vary, but they should contain some common elements. First, the agreement can allow a condemnor to enter the property to begin construction before a condemnation action is filed. Some but not all agreements will not require paying compensation until a later date. Usually, the agreement commits the condemnor to filing a condemnation case within a specific timeframe (30–60 days). Typically, the agreement allows for posting of the original state offer in lieu of the Commissioners' Award. The agreement always requires the property owner's consent as they are a signatory. The agreement is typically re-affirmed via an Agreed IOJ which reserved each party's right to challenge the amount of compensation. These agreements vest great power in the condemnor and should be used only on rare occasions and with clear commitment by both parties.

#### Benefit

- These agreements can avoid the need for court commissioners and allow for prelitigation entry.

### 5.2 Agreed Interlocutory Orders

Opportunities are available during pre-condemnation negotiations to use a request for a small plan change for a promise to enter an Agreed IOJ. This is best done by a right of entry agreement, but if the circumstances do not lend themselves to using this agreement they can be done after the petition is filed if the property owner is still willing. An Agreed IOJ may be useful if the Commissioners' Award is lower than the state's offer. In these instances, it can be a substitute for the state's offer the Commissioners' Award. Unlike a right of entry agreement, this scenario does not enable prelitigation access. It may or may not require that commissioners be appointed and given time to file their report.

#### Benefit

- This strategy can save time necessary for commissioners to be appointed and report. It saves time needed for a motion and a court appearance to obtain a right of entry.

### 5.3 Motions to Strike

If an answer contains more allegations than is statutorily allowed, the logical action is a motion to strike the answer. According to the Civil Rules of Procedure, a motion to strike a pleading must be made within 20 days of when the pleading is filed. This motion may strike the entire pleading or a portion of the offending pleading.

The Kentucky Rules of Civil Procedure state:

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any sham, redundant, immaterial, impertinent or scandalous matter.<sup>113</sup>

The courts have enforced this rule, holding:

Civil Rule 12.06 provides that a motion to strike shall be filed within twenty days after the service of a pleading. Appellee did not file its motion to strike until more than twenty days after the appellants had filed their answer and exceptions. If appellee had filed its motion to strike in a timely fashion, and the motion had been sustained, then the appellants would have still had time within which to file their exceptions.<sup>114</sup>

In the case quoted above, the then Department of Transportation attempted to strike the answer which contained exceptions. Although the decision appears to contradict KRS §416.600 and *Ratliff* since the answer did not contain a right-to-take challenge — the only relevant content in an answer to a condemnation petition — it is not inconsistent. The holding simply enforced the civil rule dictating that motions to strike be made within 20 days. The court may have sustained the motion to strike had it been made in a timely manner. As the court noted, the property owner would still have time to file exceptions even though the answer would have been stricken.

#### **Benefit**

- This strategy prevents the court from considering irrelevant issues before an IOJ is obtained.

#### **5.4 Motions to Expedite**

Many local rules provide for an economical litigation docket, which applies to property rights.<sup>115</sup> Rules allow for a status conference to be set 15 days after the last responsive pleading (answer or counter claim) is filed. A pretrial conference must be set for 60 days after the status conference. The trial date is set for 30 days after the pretrial conference. Judges have the option to extend these timeframes.<sup>116</sup> Use of a tightly scheduled rule is contingent on the attorney's ability to move quickly (which is influenced by factors such as document collection and case load).

Even if the rules lack such a docket, when faced with a right-to-take controversy the parties have a right to an expedited process to resolve the issue. A reminder to the Court of this requirement can be made via a Motion to Expedite. This holds for both trial court and appellate courts (see Section 1.2.2).

#### **Benefit**

- Motions to expedite remind the court of its responsibility to resolve right-to-take challenges quickly. They may also thwart attempts to delay the right-to-take hearing and decision.

#### **5.5 Motions to Dismiss or Filing a Second Condemnation Action after the Alleged Right-to-take Deficiency has been Corrected**

*Golden Foods, Inc. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 240 S.W.3d 679 (Ky. App. 2007) presents an interesting strategy. In that case, the condemnor lost a right-to-take challenge based on bad faith negotiations and the case was dismissed. While the condemnor appealed the dismissal, they began negotiations anew; when they were unsuccessful, they proceeded with a second condemnation case. The property owner challenged the right-to-

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<sup>113</sup> Ky. CR Rule 12.06

<sup>114</sup> *Stidham v. Commonwealth, Dep't of Transp., Bureau of Highways*, 579 S.W.2d 372, 373-74 (Ky. App. 1978).

<sup>115</sup> Ky. CR 89(1)(d).

<sup>116</sup> Ky. CR 90(1).

take in the second suit, but this time the court found good faith on the part of the condemnor. The case proceeded to determine compensation, and the original appeal was dismissed.

The precedent set by this case is that if a right-to-take challenge has been raised but not resolved, one solution — if the alleged deficiency can be corrected — is to dismiss the first action, renegotiate, and if unsuccessful, refile the condemnation suit.

A second path is to continue until a judgment is issued. If the judgment finds against the condemnor, negotiations can begin anew while an appeal continues. Alleged deficiencies can be addressed during these negotiations. If the parties still cannot reach an agreement, a second condemnation action can be filed while the appeal is pending.

#### **Benefit**

- Correcting the alleged deficiency and refiling a suit short circuits the appeal time of a successful right to take challenge.

#### **5.6 Motions for Summary Judgment**

A speedy hearing on the right-to-take issue is essential. However, the parties are not entitled to short-circuit the process by dispensing with a hearing on the right to condemn. Pursuant to *City of Bowling Green v. Cooksey*, 858 S.W.2d 190, (Ky. App. 1992), a landowner is entitled to a hearing before the trial court on the petitioner's right to condemn.<sup>117</sup> While this was a Court of Appeals case, the city of Bowling Green requested the Kentucky Supreme Court to review the decision. The Supreme Court declined this petition, which gives the decision more precedential weight. *God's Center v. Lexington Fayette Urban County Government*, 125 S.W. 3d 295 (Ky. App. 2002) adhered to this precedent. The ruling reversed an IOJ granting LFUCG the right-to-take and sent the case back to the trial court for a bench trial on the issue because:

After reviewing the law governing eminent domain and summary judgment, this Court held that God's Center was entitled to an evidentiary hearing on its factual allegations challenging the legality of the LFUCG's actions.<sup>118</sup>

However, a motion for summary judgment can only be used to expedite the process if the property owner making the challenge waives their right to a hearing. If resolving a right-to-take issue via summary judgment is desirable, it may be necessary to obtain agreed stipulations from the opposing side so no questions of fact can prevent such a motion. Otherwise, a motion for summary judgment is not appropriate and the only remedy is to press the court for an expedited hearing, which is required under the statute.

Whether a right-to-take issue can be decided by a motion for summary judgment was at issue in *Matthews v. City of Bellevue*, No. 2003-CA-002237-MR, Unpub. LEXIS 360, (Ky. App. 2005). The court had no issue with handling the challenge via summary judgment because the parties agreed to do so. But the trial court was cautioned that any decision — whether resulting from a hearing or summary judgment motion — must be based written findings of facts and conclusions of law.

From the record and docket sheet in this matter, we cannot discern whether an actual hearing was held on the City's right to condemn. There are no videotapes or transcriptions of a hearing in the record before us. It appears that the trial court ordered the parties to file simultaneous briefs on the issue of the right-to-take, and the trial court simply ruled based on the briefs. *Neither party takes issue with the trial court's handling the matter in this method, nor do we absent a preserved objection by one of the parties.*

Matthews styled her brief as a motion for summary judgment, while the City filed a "Verified Petition for Condemnation." Regardless of the title given to the respective briefs, it is clear from

<sup>117</sup> See *City of Bowling Green v. Cooksey*, 858 S.W.2d 190, 192 (Ky. App. 1992).

<sup>118</sup> *God's Center v. Lexington Fayette Urban County Government*, 125 S.W. 3d 295, 298 (Ky. App. 2002).



the parties' briefs before the trial court that they were requesting that the trial court make a finding on the City's right-to-take Matthews's property. However, in ruling on the parties' briefs, the trial court failed to make any findings whatsoever in regard to whether substantial evidence existed to support the City's decision to condemn.

Matthews pointed out this omission to the circuit court in a Motion to Alter, Amend or Vacate. Accordingly, she met the requirements of CR 52.04. After a hearing on the motion, the trial court overruled it and summarily stated that:

Respondent's Motion to alter, amend or vacate argues that the weight of the evidence and legal precedent does not support the legal conclusions made by the Court. However, Respondent re-argues the same points that this Court thoroughly disposed of prior to entering the [earlier] order.

Hence, the trial court failed a second time to make the required findings pursuant to CR 52.01 and KRS 416.610 regarding the evidence supporting the City's right-to-take Matthews's property. Accordingly, we hereby remand this matter to the Campbell Circuit Court for findings consistent with this opinion, and we affirm in part, for the reasons so stated, on the other issues before this Court.<sup>119</sup>

The ruling in *Matthews* provides the following warning to all practitioners in condemnation cases asked to propose an order resulting from a summary judgment motion — make certain the order contains the appropriate findings of facts and conclusions of law.

#### **Benefit**

- Summary judgment motions obviate the need for a hearing.

### **5.7 Supersedeas Bonds and Stays**

At the end of a bench trial to determine if a condemnor has the right under eminent domain to acquire property, a judge enters one of two orders: "Upon deciding that such right does exist in the condemnor, an interlocutory judgment is entered [and the case moves forward to determine compensation]. Should the trial court rule that the condemnor does not have the right to condemn, the trial judge is directed to enter a final judgment [dismissing the action]. KRS §416.610(4)."<sup>120</sup> If the right to condemn exists and the Commissioners' Award is tendered, the right of entry is perfected. "It is inescapable that an immediate right of entry and possession was considered as of prime importance by the General Assembly when Chapter 186 of the Acts of 1948 was passed."<sup>121</sup>

However, the *Ratliff* decision acknowledged a constitutional right to appeal the trial court's right-to-take decision. In reviewing when this appeal should happen two choices emerged: immediately after determining the issue of the right-to-take or at the end of the jury trial on the issue of compensation.

The court concluded the status quo demands protection because, if the condemnor were allowed to proceed with the planned construction and/or destruction, the condemnee could never return to their same position.<sup>122</sup> The *Ratliff* holding acknowledged the condemnor might suffer if the parties wait until after completing the trial on compensation, noting the "condemnor could easily suffer by a condemnee's action in 'laying under the log' and allowing excessive damages to accrue, prior to appeal."<sup>123</sup> The *Ratliff* judgement held that an appeal immediately

<sup>119</sup> *Matthews v. City of Bellevue*, No. 2003-CA-002237-MR, Unpub. LEXIS 360, at \*10-12 (Ky. App. 2005)

<sup>120</sup> *Ratliff v. Fiscal Court of Caldwell Cty.*, 617 S.W.2d 36, 38 (Ky. 1981).

<sup>121</sup> *Linn v. Bryan*, 312 Ky. 203, 205, 226 S.W.2d 959, 960 (1950). While this was a constitutional challenge to a now-repealed eminent domain statute, the current statute has similar language.

<sup>122</sup> The court noted, "A possible remedy to prevent the immediate taking is set forth in *Stillpass v. Kenton County Airport Board, Inc.*, Ky., 403 S.W.2d 46 (1966)", which will be discussed below.

<sup>123</sup> *Id.*

after entering the right-to-condemn decision preserves the status quo and is demanded by Ky. Const., Sec. 115.<sup>124</sup> Some legal scholars have interpreted dicta in *Ratliff*<sup>125</sup> as requiring an *automatic* stay, which prevents a right of entry until the appeal is concluded, but it does not. *Ratliff* does not explicitly state the appealing party does not need to ask for such an injunction or stay.

*Ratliff* intended that such an appeal be consistent with *Stillpass v. Niblack*, Ky., 378 S.W.2d 794 (Ky. 1964)<sup>126</sup> as it was referenced in the decision. The plaintiffs in *Stillpass* brought a separate suit against the judge hearing their condemnation case. They asked that the judge be prevented from entering an order allowing the condemnor to take possession of their property. A decision granting the condemnor the right-to-take had been entered. The Court of Appeals acknowledged a property owner appealing a right-to-take decision is entitled to a temporary injunction during the appeal of that decision if the facts show the landowner will be subject to irreparable damage. The injunction can be sought from the trial court within the same condemnation action, but it requires a request for such an injunction.

If it is ruled the condemnor has a right-to-take, KRS § 416.610(2) requires that a judge authorize the condemnor to take possession for the purposes set forth in the petition. To hold there is an implied and automatic stay to such authorization contradicts this statutory requirement. This is especially true when KRS § 416.610(2) is coupled with KRS § 416.620 (2) which states: “Appeals may be taken to the Court of Appeals from the final judgment of the Circuit Court as in other cases except that an appeal by the owner shall not operate as a supersedeas.”<sup>127</sup>

Initially, since there is no specific mention of an appeal from the interlocutory order determining the right to condemn, one could argue that KRS § 416.620 (2) refers to the final decision on compensation since this section of the statute directly refers to a trial of the exceptions to the interlocutory order. That is what the trial court in *Ratliff* held: “The only question appealable is the question of damages.” However, the Supreme Court, in overturning that determination, observed:

In accordance with the theory of statutory construction, we believe that the general assembly was cognizant of the constitutional article when it enacted the new eminent domain act. *Cook v. Ward*, Ky., 381 S.W.2d 168 (1964). We are, when considering the constitutionality of a statute, obliged to give it, if possible, the interpretation which upholds its constitutional validity. *George v. Scent*, Ky., 346 S.W.2d 784 (1961).<sup>128</sup>

To maintain consistency with *Ratliff*, the statute must be read with the assumption that the legislature was informed and acting consistent with the newly adopted constitutional amendment giving a right to appeal a right-to-take decision. Accordingly, it must also be interpreted that the final judgement of the circuit court referenced in KRS § 416.620 (2) spoke of the appeal of the final order determining a right-to-take issue. When interpreted consistently,

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<sup>124</sup> See *Ratliff v. Fiscal Court of Caldwell Cty.*, 617 S.W.2d 36, 39 (Ky. 1981).

<sup>125</sup> An injunction “... certainly is not, however, as protective to the right of a condemnee as an immediate appeal, which preserves the status quo, and which, we believe, is demanded by Ky. Const., Sec. 115, the provisions of which were known by the 1976 General Assembly.”

<sup>126</sup> *Proffitt v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 850 S.W.2d 852 (Ky. 1993) appears to be an inconsistent decision. The Supreme Court determined a property owner alleging arbitrariness and abuse of discretion in a right-to-take challenge was properly denied a stay of the IOJ even though she was willing to post a supersedeas bond. She argued *Ratliff* gave the property owner in a condemnation action the right stay possession of the property by taking an immediate appeal. The denial by the *Proffitt* court could be because the property owner conceded her land was necessary for the project and for a public use. *Proffitt* distinguished *Ratliff* which was concerned the public use of condemned property rather than arbitrary power and/or abuse of discretion.

<sup>127</sup> Supersedeas, in this context, is defined as an order suspending the power of a trial court to allow a winning party to act upon the decision granting the right to enter upon the property for construction purposes while the decision is being appealed. It is obtained by making a motion to stay the judgment. If the order is stayed, the party can request a supersedeas bond.

<sup>128</sup> *Ratliff v. Fiscal Court of Caldwell Cty.*, 617 S.W.2d 36, 38 (Ky. 1981).

an appeal from that final order on a right-to-take issue does not act as a supersedeas. If a party wants a stay, it must request one, as the Supreme Court noted in *Ratliff*: “In the instant case, the condemnee made no effort to use the procedure set out in *Stillpass*, and apparently made no effort to have the final judgment of the trial court address the right of the condemnor to take her property.”<sup>129</sup>

The Court describes the balancing of interests when the question of granting a stay is at the forefront. The goal is to preserve the status quo for both parties.

We believe that if the right of immediate possession (and all that such implies) is exercised, in many instances, even if an appellate court later reverses the trial court’s determination of the condemnor’s right-to-take, that the condemnee cannot be returned to his same position. .... The balancing of the equities of condemnor and the private citizen whose property can be taken is not an easy one.<sup>130</sup>

The ability to return the property owner to his or her same position must be balanced against costs incurred by the public due to delays. In balancing these interests, proof of the detriment to both parties should be considered. *Ratliff* did not consider that an increase in construction prices would not allow the condemnor to maintain status quo during an appeal. Taxpayers pay those extra costs. Seasonal restrictions on construction imposed by environmental requirements can prolong delays. Delays due to environmental restrictions can also result in mitigation fees. Environmental permits obtained when the project was on schedule may, if the project sits idle, require extensions or even renewal. These impose additional costs. If the project calls for replacing deficient structures, delays will require additional repair to keep the roadway open and safe. If the project calls for reconstructing unsafe roadway conditions, safety issues to the traveling public remain although they cannot be mitigated. Maintenance costs increase. The possibility of slides becoming unstable requires temporary yet costly repairs instead of being permanently corrected. Pavement condition may deteriorate and require intermediate repair with measurable costs. Project dates are often sensitive to community events and school schedules, again turning a small delay into a longer one. All of these factors warrant consideration. Should a court determine the property owner would be at a significant and irreparable disadvantage if a stay pending the appeal of a right-to-take decision is not granted, the impacts to a condemnor should be mitigated. In fact, later cases have determined that to effectuate a stay of a right-to-take order, a supersedeas bond is required.<sup>131</sup>

It is unlikely a court will allow for entry and construction on a regular basis. But the particulars of an individual case may give a court reason to consider entry for construction, or at least require mitigation of impacts caused by delay. Mitigation can be accomplished by requiring a supersedeas bond. A supersedeas bond is “a bond required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful.”<sup>132</sup> Supersedeas bonds are authorized by CR 62.03 which allows for a stay, and CR 73.04, which provides for a supersedeas bond. CR 73.04 reads in part:

When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay...<sup>133</sup>

In January 2020 the Court of Appeals ruled that supersedeas bonds are not required to appeal a right-to-take decision in a condemnation case. However, they are required to stay an order granting the right-to-take:

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<sup>129</sup> *Ratliff* at 39.

<sup>130</sup> *Id.*

<sup>131</sup> *Allard v. Big Rivers Elec. Corp.*, 602 S.W.3d 800 (Ky. App. 2020).

<sup>132</sup> Henry Campbell Black, M.A., Nolan, J.R., Connolly, M.J., *Black’s Law Dictionary*, Fifth Edition, West Publishing Co., 1979, p. 1289.

<sup>133</sup> Ky. CR Rule 73.04

The property owners are not required to post a supersedeas bond to file their appeal. However, they are required to post a supersedeas bond to stay enforcement of the judgment against them while they appeal. Pursuant to CR 62.03 and CR 73.04, an appellant must post an adequate supersedeas bond to stay enforcement of a judgment pending appeal. This guarantees the appellee's recovery of "costs, interest and damages for delay[.]" CR 73.04(1). The trial court did not err by requiring the property owners to post supersedeas bonds to stay enforcement of the judgment.<sup>134</sup>

In May 2020, the Court of Appeals again held that a supersedeas bond or an injunction is required before an Interlocutory order is stayed in an eminent domain case.

We note that Allard did not seek an injunction as suggested in *Ratliff* or post a supersedeas bond to stay enforcement of the interlocutory judgment pursuant to Kentucky Rule of Civil Procedure (CR) 62.03 and CR 73.04. And we agree with Big Rivers that *Ratliff* did not abrogate KRS 416.610(2)(c) or any part of the Eminent Domain Act. Therefore, we find no merit in Allard's argument that, once he appealed the interlocutory judgment, Big Rivers did not have the right-to-take possession of the easement upon the payment of the award.<sup>135</sup>

Both decisions are final and consistent with *Ratliff*. Their reasoning indicates a stay of the IOJ (preventing the condemnor from acting on it) is not automatic. A stay of the IOJ must be requested. If a stay is granted, the condemnor should be entitled to present proof that a supersedeas bond is appropriate.

#### Benefit

- These cases suggest there is room to explore asserting right of entry during appeal without trampling concerns over fairness. However, if attempted, it should be done fairly, strategically, and after thorough deliberation.

#### 5.8 Attorney Fees

While attorney's fees are not authorized by the Kentucky Eminent Domain Act, if a court finds a condemnor acted in bad faith or with unreasonable delay, in addition to losing a right-to-take challenge, the condemnor can also be forced to pay costs and attorney fees. As held in *Commonwealth, Dep't of Transp., Bureau of Highways v. Knieriem*, 707 S.W.2d 340, 341 (Ky. 1986):

As a general rule, attorney's fees are not allowed in the absence of a statute or contract expressly providing therefor. *Holsclaw v. Stephens*, Ky., 507 S.W.2d 462, 480 (1974). We are referred to no statute or contract expressly providing for an award of attorney's fees in a proceeding involving eminent domain. In fact, KRS 453.260(5)(c) expressly exempts proceedings involving eminent domain from the statute authorizing the award of attorney's fees in certain actions.

There was no bad faith or unreasonable delay by the condemnor shown here. Absent such a showing, we are reluctant to place the litigants in the position of allowing a landowner to gamble on litigation in the hope of being awarded attorney's fees rather than to accept legitimate offers of settlement. Allowing attorney's fees in a case such as this, where the condemnor has made an effort to take private property for what, in good faith, it thought at the time of the attempt was to be for a public use, would increase the cost to the public of acquiring property. It would also place an additional burden on the judicial process. We hold that the phrase "all costs" in KRS 416.610(4)(c) does not include an award of attorney's fees.<sup>136</sup>

<sup>134</sup> *Barone v. Sanitation Dist. No. 1*, Nos. 2016-CA-001711-MR, 2016-CA-001712-MR, 2016-CA-001713-MR, 2016-CA-001714-MR, 2016-CA-001715-MR, 2016-CA-001716-MR, 2016-CA-001717-MR, 2016-CA-001718-MR, 2016-CA-001733-MR, 2016-CA-001734-MR, Unpub. (Ky. App. 2020).

<sup>135</sup> *Allard, supra*. This case also held a person objecting to the right-to-take does not have a right to an evidentiary hearing, which contradicts previous case law.

<sup>136</sup> *Commonwealth, Dep't of Transp., Bureau of Highways v. Knieriem*, 707 S.W.2d 340, 341 (Ky. 1986).

The trial and appellate courts and Supreme Court agreed the property was being taken for a private, not public use and ruled in favor of the property owner. However, this finding did not require or trigger an award of attorney's fees.

Indeed, an award of attorney's fees against a condemnor who loses a right-to-take challenge is not automatic, as articulated in *Golden Foods, Inc. v. Louisville & Jefferson Cty. Metro. Sewer Dist.*, 240 S.W.3d 679 (Ky. App. 2007):

After applying the applicable law, we conclude that the trial court did not abuse its broad discretion in denying Golden Foods' motion for attorney fees. We disagree with Golden Foods that a finding of bad faith requires a court to award attorney fees as a matter of law. In condemnation proceedings, trial courts are granted broad discretion in awarding attorney fees based on their analysis of the unique facts of each case and that discretion will not be disturbed unless equity demands that we do so. *Bernard v. Russell County Air Board*, 747 S.W.2d at 612.

Although the trial court found that MSD had exercised legitimate authority in attempting to take land for public use, it recognized that MSD had failed to bargain in good faith during pre-condemnation negotiations.<sup>137</sup>

The *Golden Foods* decision mentioned two cases that exhibited extremely deliberate bad faith conduct that warranted imposing attorney's fees on condemnors. One, *N. Ky. Port Auth., Inc. v. Cornett*, 700 S.W.2d 392 (Ky. 1985), awarded fees after a Port Authority initially filed suit to construct a riverport.

The trial court dismissed the suit because the Port Authority had not obtained the necessary construction permit from the US Army Corps of Engineers. The Court of Appeals reversed the trial court, but the Kentucky Supreme Court reversed the Court of Appeals. After the Supreme Court decision, the trial court authorized the taking and discovery ensued. The Port Authority objected to the appraisal, so it moved to dismiss the suit without prejudice to its filing a new action in the future. The property owners moved for an award of attorney fees. The Court reasoned as follows:

Considering the right of eminent domain, Kentucky case law, the Eminent Domain Act, and the apparent recognition in Kentucky of the court's discretion to award expenses under CR 41, we conclude that costs and attorney fees may be awarded in a voluntary dismissal of an attempted condemnation upon a finding of bad faith or unreasonable delay by the condemnor. If a trial court should determine that the condemnor has acted in bad faith, it should also determine the extent to which the condemnee has been prejudiced by a dismissal and whether he could be made reasonably whole by the imposition of costs and fees as a term or condition to the granting of the dismissal.<sup>138</sup>

The Supreme Court noted that its earlier decision regarding good faith pertained only to the effort to obtain the US Army Corps of Engineers permit. The court noted the property owner had not yet been given the opportunity to submit evidence, so the trial court could not determine if the Port Authority had given the property owners the run-around, forcing them to incur enormous defense expenses while attempting to wear them out and compel a settlement. That would show bad faith.

Likewise, in *Bernard v. Russell Cty. Air Bd.*, 747 S.W.2d 610 (Ky. App. 1987) the Court of Appeals found egregious conduct on the part of the condemnor. In this case, the Air Board obtained an order from an appointed special judge directing the property owners to permit a survey of their property. But there was a problem — no lawsuit had ever been filed from which the order could have arose. The property owners obtained a writ of prohibition against the judges, prohibiting the entry of any order not associated with a lawsuit. The Air Board then filed a condemnation action and got an order to proceed with the survey. The Court of Appeals again prevented the survey. The property

<sup>137</sup> *Golden Foods, Inc.*, *supra*. at 684.

<sup>138</sup> *N. Ky. Port Auth., Inc. v. Cornett*, 700 S.W.2d 392, 394 (Ky. 1985).

owners then moved to dismiss the condemnation action, arguing a failure to comply with the pre-filing requirements of KRS Chapter 416. The trial court ruled against the condemnee, but the Court of Appeals and the Supreme Court ruled against the Air Board. Both courts held that it was not a legally formed body and had no authority to deprive any citizen of their property. The property owner moved for an award of attorney's fees which, in keeping with past rulings, the trial court denied. The property owner appealed. The Court of Appeals did not mince words in its ruling:

Condemnation proceedings that are blatantly illegitimate, and when instigated raise the specter of undue harassment and expense for a private citizen, inherently create a presumption of bad faith. It is conceivable that this presumption of bad faith could be rebutted in a case of milder circumstances; but it cannot in one whose facts are so harsh as these.

We do not cavalierly disturb the discretion of any trial court, but considering these facts, and the law of the case, all of which were also known to the trial court, equity demands that we now do so.<sup>139</sup>

While imposing attorney fees on a condemnor after a right-to-take hearing can be defended, imposition of attorney's fees on a condemnee may also be pursued. Just as in cases involving the imposition of fees on a condemnor are not triggered automatically and require some form of egregious behavior, the actions of a losing property owner in a right-to-take challenge must also be egregious to have such a sanction imposed. In *McGehee v. Commonwealth*, No. 2012-CA-000384-MR, Unpub. LEXIS 217 (Ky. App. 2017) the Court of Appeals upheld a decision by the trial court to impose attorney's fees as a sanction against the property owners for egregious conduct involving a right-to-take challenge. The property owners appealed a right-to-take challenge. While the appeal was pending, they filed an action in Franklin Circuit Court attempting to halt the condemnation. After losing in both courts, they filed an action in Federal District Court, which was also appealed to the Sixth Circuit Court of Appeals. The owners petitioned the Kentucky Supreme Court and the US Supreme Court to hear their cases after losing at the appellate level in both venues. Neither court opted to take the case.

When the trial court, upon a Motion for Fees by KYTC pursuant to CR 11, imposed sanctions in the form of attorney's fees the Court of Appeals upheld them, noting:

Rule 11 does not provide any substantive right to a party, but rather is a procedural mechanism by which courts can *prevent* and/or punish abusive litigation practices. *Lexington Inv. Co. v. Willeroy*, 396 S.W.3d 309, 312 (Ky. App. 2013). While the rule itself does not provide language establishing a standard of review, case law has provided such. *See Clark Equip. Co., Inc. v. Bowman*, 762 S.W.2d 417 (Ky. App. 1988). First, a reviewing court examines the trial court's findings of fact for clear error. *Id.* at 421. Next, the reviewing court examines the trial court's legal conclusions that a given behavior amounts to a violation *de novo*. *Id.* Finally, the reviewing court examines the nature and severity of the sanction imposed for abuse of discretion. *Id.*<sup>140</sup>

Substantial evidence exists in the record that supports the trial court's findings, in the form of multiple and voluminous pleadings filed in opposition to the KYTC's already well-established right to condemn. The trial court was within its authority, after reviewing the documents filed by the McGehees, to determine that *they served no purpose other than to delay or harass*.<sup>141</sup>

### Benefit

- Imposing attorney fees can be a deterrent to baseless right-to-take challenges and is another tool in the legal toolbox.

<sup>139</sup> *Bernard v. Russell Cty. Air Bd.*, 747 S.W.2d 610, 612 (Ky. App. 1987).

<sup>140</sup> *McGehee v. Commonwealth*, No. 2012-CA-000384-MR, Unpub. LEXIS 217, at \*8-9 (Ky. App. 2017) *emphasis* added.

<sup>141</sup> *Id.* at \*10.



## Chapter 6 Review of Other State Statutes

Many states have recourse to *quick take* processes, which are used to acquire property pursuant to the power of eminent domain. These processes let a condemnor acquire title to property before the issue of just compensation is resolved. Some states have an expedited procedure *after* legal action commences, including Kentucky.<sup>142</sup> Here, once an IOJ and the Commissioners' Award is deposited with the Circuit Court Clerk, the condemnor has a right to possess the property for all purposes enumerated in the petition.<sup>1</sup> Quick take processes in other states are similar to Kentucky's as condemnors typically obtain right of entry after suit is filed by depositing proposed compensation with the court. Methods for determining proposed compensation vary by state and include pre-litigation appraisals, post-litigation appraisals, using the condemnor's determined value; others appoint commissioners, special masters, or witnesses. Regardless of the process, once funds are available to the property owner, the property is available to the condemnor. Several jurisdictions (Alaska, Connecticut, District of Columbia, Florida, Massachusetts, Minnesota, New Hampshire, Vermont) have instituted *ex parte* processes to acquire property. In all states, individuals have the right to challenge a taking. Below we describe several state-level processes.

### Alaska

Quick take authority is limited to electric, communications, water, steam, gas, and easements. Quick take is subject to a right-to-take challenge.<sup>143</sup>

### Connecticut

Connecticut does away with the commissioners and with the need to file a motion to obtain entry. The condemnor files a petition and simultaneously deposits compensation with the court. Upon receipt, the court prepares a certificate of taking. At that point the compensation vests with the property owner and the property vests with the condemnor which has right of entry. Then the property owner must either file a notice of acceptance of just compensation or apply for a review of the compensation. A referee is appointed to view the property, receive testimony, and report to the court. The report — unless rejected for improper conduct — becomes final and can be appealed to the appellate courts. This process is only available to municipalities, but it serves as a sample model.<sup>144</sup>

### District of Columbia

Modeled after the federal process set forth in 40 U.S.C.S. § 3113 et. seq. At the time of filing, the condemnor makes a deposit of the initial offer and takes immediate possession of the property.

### Florida

Modeled after the federal process: "A quick-take condemnation allows title to pass in advance of final judgment but is available to a limited group of condemnors. § 74.011, Fla. Stat. (2011)."<sup>145</sup>

### Indiana

Lacks a quick take provision. The process is similar to Kentucky's provisions in that it requires negotiations before a condemnation action is initiated. After the action is filed, the court appoints appraisers who submit a report stating what they believe to be just compensation. If the property owner is not in agreement, the issue of compensation goes to trial. In addition, the property owner can challenge the condemnor's right-to-take the property within 30 days after being served with the summons. Unlike Kentucky, after the case is filed, but prior to trial, the condemnor must make a final offer to purchase the property. If the trial award is greater than the pretrial offer of the

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<sup>142</sup> As does Arizona, Arkansas, California, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Maryland, Michigan, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virgin Islands, Virginia, Washington, West Virginia, and Wisconsin.

<sup>143</sup> See *DOT & Pub Facilities v. 2.072 Acres*, 652 P.2d 465 (Alaska 1982). Excerpt From: Blake, William G., *The Law of Eminent Domain: Fifty State Survey 2011/2012*.

<sup>144</sup> See 7 Nichols on Eminent Domain § G2A.03 (2020).

<sup>145</sup> Excerpt From: Blake, William G., *The Law of Eminent Domain: Fifty State Survey 2011/2012*, p. 162.

condemnor, the condemnor must pay the property owner's attorney's fees.<sup>146</sup> Unlike Kentucky, the issue of just compensation is tried by a court-appointed panel of three disinterested persons: one disinterested freeholder of the county and two disinterested licensed appraisers.<sup>147</sup> If either party is aggrieved by the panel's report, they can make exceptions to the report and the issue goes to a jury trial.<sup>148</sup>

### Illinois

The petitioner may file a motion at any time after the complaint to condemn has been filed requesting the immediate vesting of title in the petitioner. No motion for quick take is filed without prior approval of the assistant attorney general in charge of land acquisition. "Even with the use of quick take procedures, the time between the initial request for condemnation and the actual vesting of title is a minimum of ninety days or more."<sup>149</sup> "In the event of an appeal [of a right-to-take decision], either the trial or reviewing court may stay further proceedings pending the outcome of such appeal. A stay may well prevent the department from obtaining title or possession in less than six months."<sup>150</sup>

### Massachusetts

A board of officers initially adopts an order of taking. The order of taking contains (1) a description of the land, (2) the interest in the land to be taken, and (3) the purpose of the taking. The board files the order of taking in the registry of deeds. On the filing of the order in the registry of deeds, title vests in the body politic for which the board adopted the order. The filing vests in the condemnee a right to damages for the taking. After the deed filing has been made, a notice is sent to the owner that the property has been condemned. Furthermore, at the time the board of officers adopts the order of taking, it also awards damages it has calculated as necessary to compensate the owner for the taking.

There is a requirement that appraisals be made of the property. These appraisals help determine the award. After filing the order of taking, the board may offer additional settlements to the condemnee. If the condemnee is dissatisfied with the award made by the board of officers, they can petition the superior court for an assessment of damages. Essentially, in this procedure the condemnee becomes the plaintiff and is subject to a three-year statute of limitations in which to challenge the award of compensation made by the board of officers. In addition to challenging the award made by the board of officers in the superior court, the condemnee may at that time question the right of the condemnor to have initially taken the property.<sup>151</sup>

### Michigan

"Michigan is a quick-take state. This means the agency obtains title to the property before just compensation is ultimately determined, although it must pay its good faith offer to the property owner at the outset of a lawsuit. The agency must complete the taking once an owner answers the complaint and cannot dismiss the lawsuit if it believes that the just compensation awarded is excessive."<sup>152</sup>

### Minnesota

There are two different processes for condemnation. The normal procedure is long and drawn out. Quick take is an alternative procedure which requires a 90-day notice be sent to the property owner and the approved appraisal amount be either paid to the property owner or deposited with the court, at which time right of entry is obtained.

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<sup>146</sup> Ind. Stat. Ann. § 32-24-1-1 *et seq.*

<sup>147</sup> Ind. Stat. Ann. § 32-24-1-7.

<sup>148</sup> Ind. Stat. Ann. § 32-24-1-11.

<sup>149</sup> Illinois Department of Transportation Office of Highways Project Implementation Bureau of Land Acquisition, *Land Acquisition Policies and Procedures Manual*, 4.23, Condemnation, 4.23.1 Request for Condemnation, p. 4-44 August 2018.

<sup>150</sup> *Id.* at 4.23.4 Immediate Possession (Quick Take Procedures, pp. 4-47 – 4-48.

<sup>151</sup> 7 Nichols on Eminent Domain § G2A.03 (2020).

<sup>152</sup> Jason J. Krentler, MAI, MRICS, Stephon B. Bagne – Clark Hill, PLC, *An Introduction to Eminent Domain*, Stout, Risius, and Ross, <https://www.clarkhill.com/uploads/medium/resource/807/introduction-eminant-domain.pdf>.

## New Hampshire

All condemnation actions are filed with the board of tax and land appeals. That board travels to county courthouses to hear all condemnation cases. If the condemnor deposits the appraised value at the time the action is filed, it obtains right of entry at the time of filing. However, the property owner may challenge the right-to-take, which challenge is heard by the board. The board issues a ruling. If the condemnor is found to have the right to acquire, the board hears the compensation issue. The board is not bound by the rules of evidence, and facts are determined by balancing the probabilities. Burden of proof for all issues is on the condemnor.

## Ohio

Ohio law requires an attempted voluntary purchase before initiating condemnation proceedings.<sup>153</sup> In addition, Ohio requires a notice of intent to purchase in a specified form.<sup>154</sup> An appraisal is required prior to making a good-faith offer.<sup>155</sup> After the suit is filed, the property owner can lodge a right-to-take challenge based on the right to make the appropriation, the inability of the parties to agree, or the necessity of the appropriation.<sup>156</sup> If a challenge is made, the court must take the matter not less than five or more than fifteen days from the date the answer was filed.<sup>157</sup> If the property owner is aggrieved of this decision, it can be appealed.<sup>158</sup> However, the decision cannot be appealed until there has been a determination of compensation.<sup>159</sup>

Ohio public agencies have an alternative quick take process. A public agency may deposit with the court, at the time of the filing of the petition, an amount determined by the agency to represent the fair market value of the condemned property. The agency may then take possession of the property, but not possess or occupy any structures on the taken property.<sup>160</sup> Property owners can request a stay of any order pending appeal of a decision granting an appropriation.

But for our orders in this case, the appellants' property would likely have already been razed. Although we reiterate that it is imperative that appellate courts review these cases as expeditiously as possible, *Pope*, 54 Ohio St.2d at 19, 8 O.O.3d 7, 374 N.E.2d 406, we doubt the courts' ability, absent the authority to issue a stay, to move more quickly than a bulldozer.<sup>161</sup>

## South Carolina

Challenges to the right to condemn must be made by filing a separate action. The action must be filed within 30 days of receiving the summons in the condemnation action. The purpose requiring a second action challenging the right-to-take is to keep right-to-take issues separate from compensation issues. The condemnation action is stayed until the right-to-take issue is resolved unless both parties agree otherwise.<sup>162</sup> "If the court determines the right-to-take issue was not raised and litigated in good faith by the landowner, the court must award the condemnor reasonable costs and litigation expenses incurred therein."<sup>163</sup> Likewise, if it is determined the condemnor has no right-to-take, the landowner's reasonable costs and litigation expenses must be paid by the condemnor.<sup>164</sup> Right-to-take cases can take five years or more to resolve.

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<sup>153</sup> Ohio Rev. Code Ann. § 163.04

<sup>154</sup> Ohio Rev. Code Ann. § 163.041

<sup>155</sup> Ohio Rev. Code Ann. § 163.04.

<sup>156</sup> Ohio Rev. Code Ann. § 163.08.

<sup>157</sup> Ohio Rev. Code Ann. § 163.09.

<sup>158</sup> *Nieman v. Bd. of Educ.*, 22 Ohio App. 457, 153 N.E. 918 (1925).

<sup>159</sup> See *Cincinnati Gas & Elec. Co. v. Pope*, 54 Ohio St. 2d 12, 374 N.E.2d 406 (1978) and *City of Cincinnati v. Dimasi*, 2006-Ohio-3345 (Ct. App.).

<sup>160</sup> Ohio Rev. Code Ann. § 163.06

<sup>161</sup> *City of Norwood v. Horney*, 2006-Ohio-3799, ¶ 133, 110 Ohio St. 3d 353, 391, 853 N.E.2d 1115, 1152.

<sup>162</sup> S.C. Code Ann. § 28-2-470.

<sup>163</sup> S.C. Code Ann. § 28-2-510. See *Oien Family Investments, LLC, v. Piedmont Municipal Power Agency*, 424 S.C. 168, 817 S.E.2d 647 (Ct. App. 2018).

<sup>164</sup> See Blake, William G., editor, *The Law of Eminent Domain: Fifty State Survey 2011/2012*; de Holczer, Paul D., author South Carolina Chapter, American Bar Association Publishing, 2011-2012, pp. 285, 386.

## **Vermont**

The bulk of the procedure for a municipal condemnation does not require that the parties enter into court proceedings. Rather, the governing body of a city, town, or village holds hearings and gives notice to affected owners that the governing body intends to condemn their property. It is implied that the governmental unit must negotiate and offer a reasonable price for the property before holding the hearings and giving notice.

At the hearings, the governmental body determines just compensation, which must be paid or tendered to affected owners before possession of the land may be taken. If the condemnee is dissatisfied with the governing body's award, the governing body may refer the question of the award to a disinterested person "whose award shall be made in writing and shall be final." If the condemnee is still dissatisfied after the award by the disinterested person, they may file a petition with the superior court within 60 days of the recording order filed by the governmental body.

The superior court then appoints three disinterested commissioners to inquire into the necessity of the land taken and the award amount. Commissioners conduct a hearing and report to the court. The court is not bound by the report and may accept or reject the report in part or in whole. The court makes the final determination of just compensation. Title to the property vests in the condemnor when the damages reflecting just compensation are paid to the person entitled to receive them.<sup>165</sup>

While many states have quick take provisions, a challenge to an agency's right to condemn can delay the process, even a process intended to move quickly.

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<sup>165</sup> 7 Nichols on Eminent Domain § G2A.03 (2020).

## Chapter 7 Conclusions

Condemnors rarely lose a right-to-take challenge which makes litigation of this issue both time-consuming and fruitless for property owners. Condemnation practitioners in Kentucky have the same delay issues as those in other states. However, several other states have statutory recourse which Kentucky does not, both of which can impact the amount of time needed to obtain right of entry — (1) the ability to post the state offer as the amount of compensation paid, which enables early entry and construction; and (2) awarding attorney fees to the prevailing party in a right-to-take challenge. Despite not being codified in statutes, these tools are available to Kentucky attorneys. The parties can agree to posting the state offer in lieu of the Commissioners' Award if circumstances motivate the parties to reach such an agreement. This can occur when the state's offer exceeds the Commissioners' Award, or when the property owner agrees to secure minor but more desirable plan changes. This course of action requires flexibility in right-of-way negotiations and teamwork between attorneys and right of way agents. Attorney fees are available to condemnors or the property owner if the litigation behavior is egregious or if the arguments are so unsubstantial as to violate CR 11.

## Appendix A 2020 National Attorney Survey



# Default Report

*Right to Take Survey of State DOTs*

Personal Identifying Information Removed

## Q3 - Organization

### Organization

Arkansas DOT

Ohio Attorney General

Department of the Attorney General

Dyer & Rusbridge, P.C. - Georgia

King Law Group - Georgia

Carothers & Mithcell - Georgia

Law Offices of Mark Weinstein, P.C. - Georgia

Georgia Attorney General

Tennessee Office of Attorney General on behalf of Tenn. Department of Transportation

Office of the Attorney General of Virginia

Commonwealth of Pennsylvania, Department of Transportation

New Mexico Department of Transportation

Washington State Attorney General's Office

South Dakota Dept. of Transportation

Kansas Department of Transportation

South Carolina Department of Transportation (SCDOT)

Montana Department of Transportation

Missouri Highway and Transportation Commission

**Q3 - How many years have you been involved in condemnation litigation?**

How many years have you been involved in condemnation litigation?

8

21

7

22

15-20

24

19

23

24

33

20

6

16

28

20+

13

25

**Q4 - How many new right to take challenges do you typically experience per year? (last 3 years)**

How many new right to take challenges do you typically experience per year? (last 3 years)

3

2

1-2

2

0

&lt;1

1

10-15

1 to 2

0

&gt;5

3-5

1-2

None

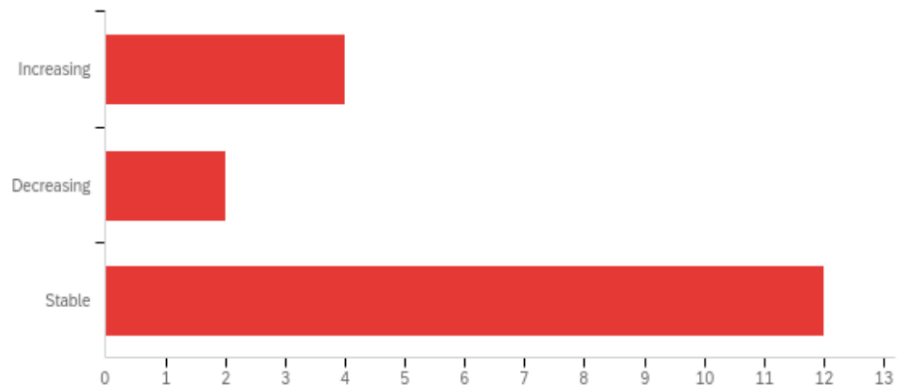
0

5 approximately

less than 1

0

**Q5 - Is the frequency of right to take challenges?**



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Is the frequency of right to take challenges?	1.00	3.00	2.44	0.83	0.69	18

#	Answer	%	Count
1	Increasing	22.22%	4
2	Decreasing	11.11%	2
3	Stable	66.67%	12
	Total	100%	18

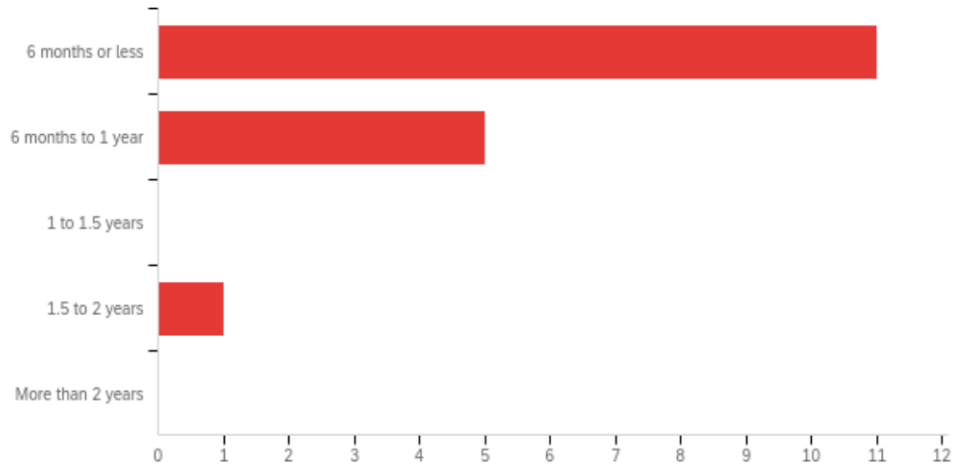
**Q6 - Please list, based on your experience and in order of most frequent to least frequent, the 5 most common reasons for a right to take challenge.**

1	2	3	4	5
compensation not adequate	damages to use of remainder	construction design not complete		
ignorance of the law in Ohio	attempt to gain leverage in negotiations			
subject property owner is challenging value or property	unable to find certain subject property owners	subject property owner does not want to sell their property		
Unfairness in negotiation	Not adequately compensating for damage			
I do extensive litigation as to value, few challenges to right to take. alleged failure to follow statutory notice/negotiation requirements	lack of public necessity	bad faith		
Claim for non-compliance with the Property Owners Bill of Rights act based on recent precedent expanding remedies under the act.				
negotiating in bad faith	bad engineering design	City of Marietta v Summerour 302 Ga. 645, 645, 807 S.E.2d 324, 325 (2017)		
Fairness of Compensation Process	Need for the subject project	Anti-government prejudice		
Misunderstanding of the law				
Just compensation	Engineering discretion/design	Construction/Access	Excessive taking/nature of title	Environmental
Just compensation amount offered	Design issues	Input from property owner	Number of public meetings	Good faith negotiations
Lack of necessity—excessive taking	Arbitrary and Capricious use of condemnation power	Insufficient environmental review		

Landowner unhappy with compensation	Landowner unhappy with design aspects of project	Landowner upset about treatment by DOT or other governmental agency		
Religious Freedom Restoration Act	landowners claimed they worshipped at the taking area			
displeasure with particular acquisition	displeasure with offer of compensation	displeasure with project		
lack of public use for property	failure to conduct good faith negotiations			



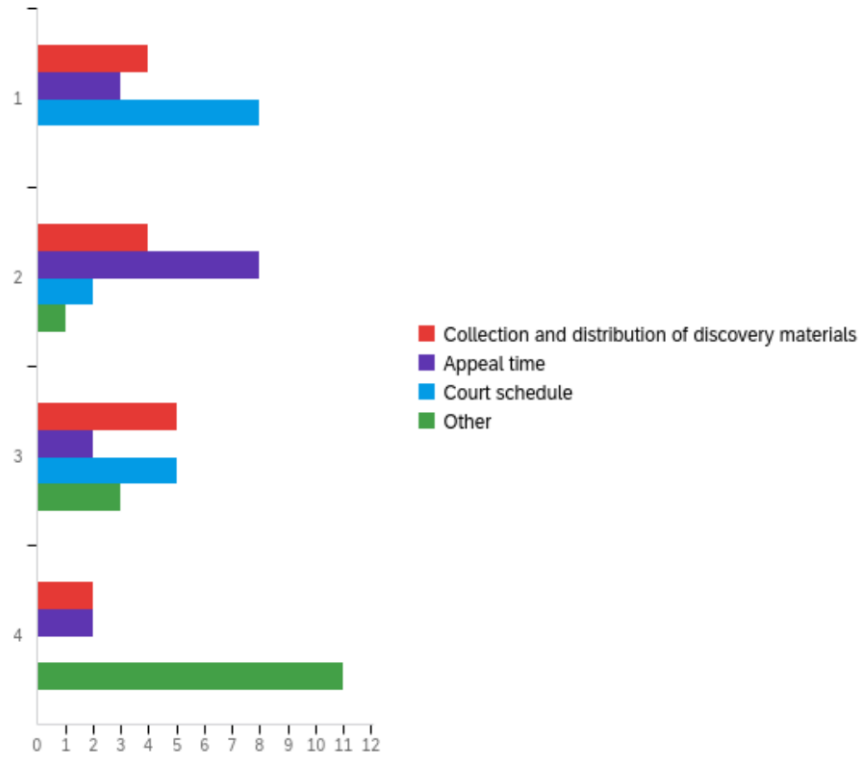
**Q7 - On average, how long between when the challenge is made and when right of entry is obtained?**



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	On average, how long between when the challenge is made and when right of entry is obtained?	1.00	4.00	1.47	0.78	0.60	17

#	Answer	%	Count
1	6 months or less	64.71%	11
2	6 months to 1 year	29.41%	5
3	1 to 1.5 years	0.00%	0
4	1.5 to 2 years	5.88%	1
5	More than 2 years	0.00%	0
	Total	100%	17

**Q8 - Most frequent reason for delay of the resolution? (Rank the following from most frequent to least frequent.)**



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Collection and distribution of discovery materials	1.00	4.00	2.33	1.01	1.02	15
2	Appeal time	1.00	4.00	2.20	0.91	0.83	15
3	Court schedule	1.00	3.00	1.80	0.91	0.83	15
4	Other	2.00	4.00	3.67	0.60	0.36	15

#	Question	1		2		3		4		Total
1	Collection and distribution of discovery materials	26.67%	4	26.67%	4	33.33%	5	13.33%	2	15
2	Appeal time	20.00%	3	53.33%	8	13.33%	2	13.33%	2	15
3	Court schedule	53.33%	8	13.33%	2	33.33%	5	0.00%	0	15
4	Other	0.00%	0	6.67%	1	20.00%	3	73.33%	11	15

**Q8b - If you answered other, please expand on your answer here:**

If you answered other, please expand on your answer here:

service is often difficult, especially when we are unable to locate the subject property owner

Virginia law is very clear. The burden of proof of necessity of take is on the condemnor but landowner counsel understand that roadways are public purposes.

Factual investigation; expert witness & exhibit preparation

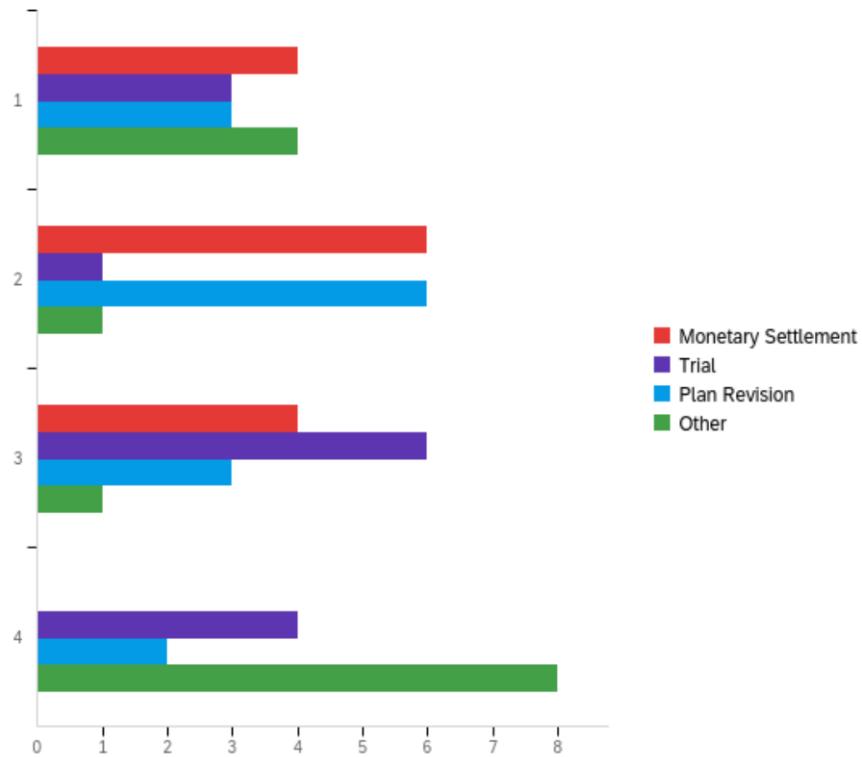
1. Appeal time, 2. Court schedule, 3. Collection of discovery materials

In my 16 years of experience, DOT has only had about 5 necessity challenges, and all were resolved quickly and in DOT's favor.

The one and only challenge to KDOT's authority to take was well outside the three years. The case proceeded to trial quickly and KDOT was able to proceed with other phases of construction while waiting for a verdict.

attempts to resolve without court assistance

**Q9 - How does a right to take challenge get resolved? (Rank the following from most frequent to least frequent.)**



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Monetary Settlement	1.00	3.00	2.00	0.76	0.57	14
2	Trial	1.00	4.00	2.79	1.08	1.17	14
3	Plan Revision	1.00	4.00	2.29	0.96	0.92	14
4	Other	1.00	4.00	2.93	1.33	1.78	14

#	Question	1	2	3	4	Total
1	Monetary Settlement	28.57%	4	42.86%	6	14
2	Trial	21.43%	3	7.14%	1	14
3	Plan Revision	21.43%	3	42.86%	6	14
4	Other	28.57%	4	7.14%	1	14

**Q9b - If you answered other, please expand on your answer here:**

If you answered other, please expand on your answer here:

motion practice prior to trial

variety of ways, monetary settlement, further discussions with subject property owner, default, etc.

Allowing owner to remain on property for a certain period

Usually we prevail or refile.

Denial of the Motion to Set Aside the Condemnation after an in court Hearing

We normally resolve any questions by communicating with the challenger. Lawsuits are rare. Landowner challenges must be made in Answer to Petition for Condemnation

Resolve construction staging, access or parking issues

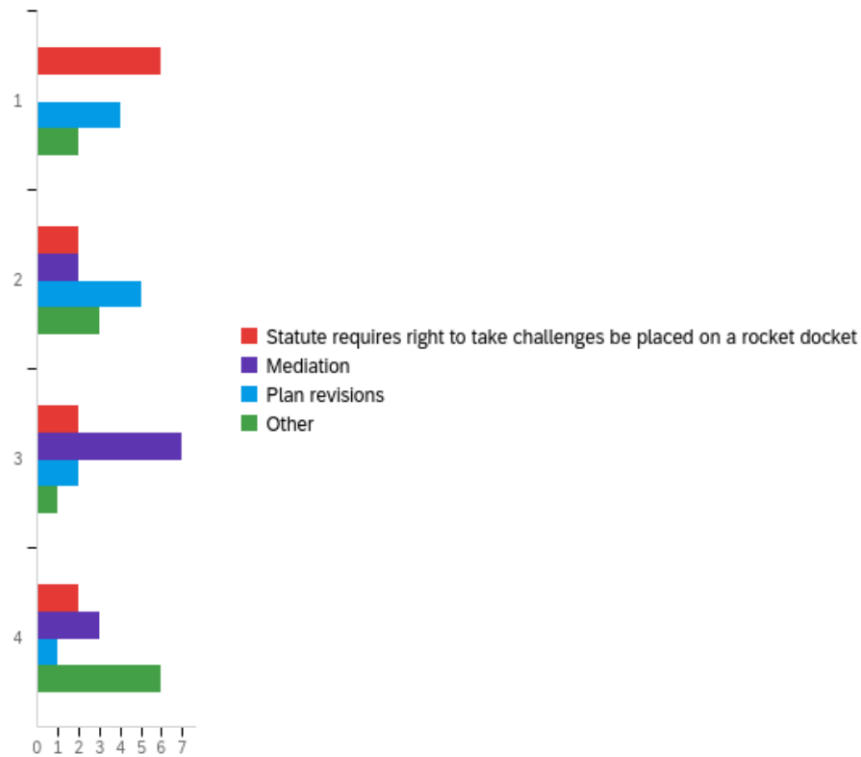
1. Monetary settlement, 2. Plan revision, 3. Trial

A hearing is scheduled and resolution in favor of DOT at the hearing, with an order executed that day or shortly after.

Trial

we have not had a challenge such as this in over ten years. Our jobs always have a public purpose

**Q10 - What is the most frequently used tool, legal or otherwise, specific to your jurisdiction that speeds up the process of resolving the challenge? (Rank the following from most frequent to least frequent.)**



#	Field	Minimum	Maximum	Mean	Std Deviation	Variance	Count
1	Statute requires right to take challenges be placed on a rocket docket	1.00	4.00	2.00	1.15	1.33	12
2	Mediation	2.00	4.00	3.08	0.64	0.41	12
3	Plan revisions	1.00	4.00	2.00	0.91	0.83	12
4	Other	1.00	4.00	2.92	1.19	1.41	12



#	Question	1		2		3		4		Total
1	Statute requires right to take challenges be placed on a rocket docket	50.00%	6	16.67%	2	16.67%	2	16.67%	2	12
2	Mediation	0.00%	0	16.67%	2	58.33%	7	25.00%	3	12
3	Plan revisions	33.33%	4	41.67%	5	16.67%	2	8.33%	1	12
4	Other	16.67%	2	25.00%	3	8.33%	1	50.00%	6	12

**Q10b - If you answered other, please expand on your answer here:**

If you answered other, please expand on your answer here:

Dismiss and refile early (requires payment of accrued attorney fees)

If we cannot resolve by communication, the court can determine. Even though there was a law change to remove presumption of public use, I have not seen any challenge

The Code provides issues of just compensation may not be raised to challenge the taking

1. Statute requiring expedited hearing, 2. mediation, 3. plan revisions

I tried to answer rocket docket, but encountered problems.

There is no statutory requirement to speed up the process, but the Court worked with us.

Monetary settlement

**Q11 - What percentage of right to take challenges are decided in favor of the property owner?**

What percentage of right to take challenges are decided in favor of the property owner?

N/A

0

0

0

<10%

5%

0-2

0

0

>10%

0

0

0

0%

0

less than 1 percent

0

**Q12 - Of those right to take challenges that were successful for the property owner, what was the basis of the decision(s)?**

Of those right to take challenges that were successful for the property owner, what was the basis of the decision(s)?

We settle or mediate most of the time.

n/a

failure to follow statutory notice/negotiation requirements

Insufficient description of a temporary construction easement. See, Georgia 400 Indus. Park, Inc. v. Department of Transp., 274 Ga. App. 153, 616 S.E.2d 903 (2005)

not sure we usually win them

N/A

We have not seen any challenges

Engineering design/construction

N/A

N/A

N/A

Not applicable.

No proper analysis of need.

**Q13 - Do you consider your state's right to take process efficient in reaching a conclusion, and if not what improvements should be made? If you consider the process to be efficient, what factors allow it to be concluded quickly?**

Do you consider your state's right to take process efficient in reaching a conclusion, and if not what improvements should be made? If you consider the process to be efficient, what factors allow it to be concluded quickly?

Our current statutory scheme is efficient, IF followed by the courts.

Nothing about eminent domain litigation in Ohio is efficient.

Yes

It is not efficient. There needs to be an allowance for attorney's fees to prevent claims that have not merit.

In Georgia, title to property is acquired upon obtaining signature of judge on order and filing of petition for condemnation in the court. This order is routine and generally provides 30 days or 60 days for condemnee to vacate the property. A challenge to the taking must be filed in Georgia as a motion to set aside. These are somewhat unusual though they seem to be occurring more often. However, I have done extensive litigation for Georgia DOT over the years as to value and business loss. I have personally never had a motion to set aside filed on one of my cases.

Yes.

Generally, the process is efficient because Georgia law requires expedited review of a Motion to Set Aside a Condemnation Petition. O.C.G.A. Sec. 32-3-11(c). However, recent case law has expanded the time frame. *Adkins v. Cobb County*, 291 Ga. 521, 731 S.E.2d 665 (2012). Also, if a Condemnee does not seek immediate review of the denial of their Motion to Set Aside by interlocutory appeal, then the ruling on the Motion could conceivably be brought on appeal after trial, which could delay for years a final resolution of the set aside claim.

We have a thirty day hearing deadline but case law says it is directory rather than mandatory. We have a problem with frivolous motions to set aside filed merely in order to delay and negotiate. There is no statute except for basic frivolous litigation statutes that allow for the condemnor to obtain attorneys' fees.

Very efficient. Nearly all of our cases are unquestionably takings for public use. In Tennessee, once public use is established, the challenger's burden of proof is very difficult: clear and palpable abuse of power, fraud, or capricious action on the part of the condemnor.

The process is efficient because the law is very clear. Our eminent domain bar understands that roadway building is a public purpose. The only challenge I can imagine would be from someone unfamiliar with Virginia eminent domain law.

The process is efficient. Although filed as a civil action, the Code is the exclusive provision and law of eminent domain. Section 306 of the Code, 26 Pa.C.S. Section 306, and applicable case law separate preliminary objections to a declaration of taking into a specialized class apart from other civil actions. By law, grounds for challenging the power and right to condemn are limited and courts may not substitute their discretion for that of the condemning agency. In addition, collateral matters (such as environmental permitting issues; the federal Uniform Act) are deemed irrelevant to the right and power to condemn.

Yes. Challenges almost always resolved without a hearing, but expedited hearings almost always provided by courts when a hearing is necessary.

I don't think it's an efficient process but it has not significantly impacted WSDOT's project schedules. Washington is not a "quick take" state so we need to establish "right to take" but challenges are rare. Condemning agencies are generally granted deference to determine the necessity of the take absent arbitrary and capricious action. We recently had a hotly contested right to take challenge on a major construction project by a well-funded property owner. It required discovery and multiple appeals, and the process took well over a year. The court system

generally expedited things over a regular civil case, but it still took a long time. On a separate note, I am concerned the increased use of design-build contracting adds risk to condemnation cases and the "right to take" issue. Since acquisition decisions are sometimes made on minimum design work, it's possible a property owner could argue the state has incomplete information and thus does not have the right to take. The most recent right to take challenge raised this issue, but it was not the focus of owner's argument and the case was not decided on that point.

I believe it is relatively efficient. Locating mortgage holders and heirs can sometimes be difficult.

Given our limited experience with taking challenges, it is difficult to answer this question.

The process is not as efficient as it could or should be; however, SCDOT conforms to project procedures (NEPA, etc.) which tend to defeat challenge actions which, in South Carolina, must be predicated on fraud, bad faith or abuse of discretion. Most of the challenge actions assert abuse of discretion, especially lack of necessity.

No, the process is not efficient. We must go to Court to force a decision. The Court's dockets are full and would cause great delay in every case. The Court should require the landowner's to pay the state's costs in a baseless challenge. Our state's laws requires quick determinations from the Court on necessity, but they seldom follow the required timelines. Some incentive needs to be introduced to convince landowners that they should only challenge necessity when there is a basis to do so.

We are fairly efficient. We tell our right of way division to expect that it will take 6 months to acquire property once we have received the information necessary to file the condemnation petition. Our main problem is court delays.

